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July 12, 2006

FILED ELECTRONICALLY AND BY FIRST-CLASS MAIL SERVICE
The Honorable Charles L.A. Terreni
Executive Director
South Carolina Public Service Commission
Post Office Drawer 11649
Columbia, South Carolina 29211

RE: Joint Petition for Arbitration of NewSouth Communications, Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius [Affiliates] of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended
Docket No. 2005-57-C, Our File No. 803-10208

Dear Mr. Terreni:

Enclosed is the original and one copy of the **Post Hearing Brief** for filing on behalf of the Joint Petitioners in the above-referenced docket. By copy of this letter, I am serving all parties of record in this proceeding and enclose my certificate of service to that effect.

Attachment Six to the Brief is being filed under seal, pursuant to a previous ruling in this Docket granting it (and other documents) confidential and proprietary status. I have included that attachment in a separate, sealed envelope.

Please acknowledge your receipt of this document by file-stamping the copy of this letter enclosed, and returning it in the enclosed envelope.

With kind regards, I am

Very truly yours,

John J. Pringle, Jr.

JJP/cr
cc:
all parties of record
Enclosures
THIS DOCUMENT IS AN EXACT DUPLICATE OF THE E-FILED COPY SUBMITTED TO THE COMMISSION IN ACCORDANCE WITH ITS ELECTRONIC FILING INSTRUCTIONS.

BEFORE THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

IN RE:

JOINT PETITION FOR ARBITRATION OF NEWSOUTH COMMUNICATIONS CORP., NUVOX COMMUNICATIONS, INC., KMC TELECOM V, INC., KMC TELECOM III LLC, AND XSPEDIUS [AFFILIATES] OF AN INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO SECTION 252(b) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED	**)**	**Docket No. 2005-57-C**

JOINT PETITIONERS' POST-HEARING BRIEF

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July 27, 2006

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INTRODUCTION

Joint Petitioners' aim in this arbitration, as well as in negotiations, is to obtain an Interconnection Agreement ("Agreement") that comports with prevailing law, preserves the rights already guaranteed to them by the Federal Communications Commission ("FCC") and the Public Service Commission of South Carolina ("Commission"), and protects Joint Petitioners from BellSouth's ability to injure them and their customers through negligent or coercive conduct. Throughout this case, Joint Petitioners have stressed a few themes that link their positions on several issues and illustrate the fallacy of BellSouth's positions and BellSouth's intransigence during the negotiation of this Agreement:[1]

The Agreement Must Preserve Joint Petitioners' Rights Under Applicable Federal and State Law [Items 9, 12, and 65]

Three of the issues remaining in this arbitration represent Joint Petitioners' request to avail themselves of, or preserve, legal rights and network facilities already provided to them by applicable law. In **Item 9**, Joint Petitioners seek to preserve their right to seek dispute resolution before a court of competent jurisdiction. In **Item 12**, Joint Petitioners seek to preserve their right to rely on relevant applicable law unless expressly agreed otherwise. In **Item 65**, Joint Petitioners seek to preserve their right to continued access to BellSouth's transiting service at Commission-approved TELRIC-compliant rates and without imposition of a Transit/Tandem Intermediary Charge ("TIC") that is not Commission-approved and TELRIC-compliant, and does not recover any identified or legitimate BellSouth costs.

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[1] At the hearing held on June 1, 2005, the Commission granted BellSouth's motion to move Items 26, 36, 37, 38 and 51 to the Generic Proceeding, Docket 2004-316-C. Accordingly, the Joint Petitioners do not present any argument on these issues in this brief.

Joint Petitioners Should Be Protected from BellSouth's Coercive Leveraging of its Near-Monopoly Status [Items 86(B),100, 101, 102, and 103]

Four items in this arbitration involve the ability of BellSouth, by virtue of its control over the local network and dominant market share, to shut down or impede Joint Petitioners' service for a number of purported "causes." In Item **86(B)**, Joint Petitioners seek to prevent BellSouth's unilateral imposition of "pull-the-plug" remedies – such as suspension of ordering and provisioning functions or termination of all services to Joint Petitioners and their South Carolina customers – for alleged noncompliance with CSR access rules. In **Item 100**, Joint Petitioners seek to prevent BellSouth from suspending or terminating Joint Petitioners' ability to serve South Carolina customers based on a failure to calculate precisely the amounts outstanding on all of their accounts or failure to accurately predict timing of dispute posting and payment receipt. In **Item 101**, Joint Petitioners seek to set a one month maximum deposit amount for services billed and advance (two months for services billed in arrears) in light of the Joint Petitioners' well established business relationships with BellSouth and BellSouth's recent agreement to accept the same with another CLEC. In **Item 102**, Joint Petitioners seek a deposit "offset" based on all past due amounts owed by BellSouth and provides for the restoration of such offset based on BellSouth's meeting the same "good payment history" standard that applies to Joint Petitioners. Finally, in **Item 103**, Joint Petitioners seek to prevent BellSouth from suspending or terminating Joint Petitioners' service if they do not remit a requested deposit, regardless of whether it is excessive or unreasonable, within 30 days.

This Agreement Should Reflect and Incorporate the Practical Business Experience of the Parties Since the 1996 Act [Items 4, 5, 6, 7 and 97]

The remaining five items in this case stem from the fact that the parties have the benefit of nine years' experience under the 1996 Act – operationally and financially – from which to draw. Joint Petitioners therefore have crafted language that reflects this experience, especially with regard to issues of general contracting, to make the Agreement more commercially reasonable and less one-sided in BellSouth's favor. Though this Agreement may be mandated in part by Sections 251 and 252 of the 1996 Act, BellSouth has no basis to eschew general fairness and what is commercially reasonable in favor of onerous, heavy-handing, and one-sided terms that are neither fair nor commercially reasonable. Thus, in **Item 4** Joint Petitioners seek to ensure that the parties are entitled to a modest measure of relief for damages caused by negligence. In **Item 5**, Joint Petitioners seek to ensure that they need not mirror BellSouth's limitation-of-liability language in their tariffs and custom contracts (as BellSouth has no obligation to and does not do so in its own contracts) or incur indemnity obligations. In **Item 6**, Joint Petitioners seek to clarify that damages that are direct and reasonably foreseeable should not be considered indirect, consequential or incidental. In **Item 7**, Joint Petitioners seek to ensure, in accordance with universally accepted principles of indemnification, that the parties indemnify each other for damages caused by their own negligence or violation of the law. **Item 97** seeks a payment due date of 30 days from receipt of a bill, which provides a reasonable and non-variable interval in which to review, dispute and pay bills in a manner necessary to establish a good payment history.

Joint Petitioners will address all items in sequential order for the sake of convenience, but ask the Commission to bear these themes in mind as a means of understanding Joint Petitioners' need to resort to arbitration in the forging of this Agreement.

STANDARD OF REVIEW AND STATEMENT OF JURISDICTION

The 1996 Act empowers the Commission to arbitrate interconnection agreements on the petition of any party. 47 U.S.C. § 252(b)(1). The Commission has jurisdiction over every issue raised in the petition. *Id*. § 252(b)(4)(A). These issues may not always relate directly to a section 251 obligation, but rather may include any term or condition that the parties had attempted to negotiate. *Coserv Ltd. Liab. Corp. v. Southwestern Bell Tel. Co*., 350 F.3d 482, 487 (5th Cir. 2003). In addition, the Commission has jurisdiction over disputes regarding terms and conditions necessary for implementing or performing the agreement, including liability-related terms and enforcement mechanisms. 47 U.S.C. § 252(b)(4)(C) (state commission may "impos[e] appropriate conditions as required to implement subsection [251] (c)"); *MCI Telecomms. Corp. v. BellSouth Telecomms. Inc*., 298 F.3d 1269, 1274 (11th Cir. 2002) ("Clearly, enforcement and compensation provisions, including the liquidated damages provision desired by MCI, fall within the realm of 'conditions … required to implement' the agreement.").

In resolving the disputed items set for arbitration, the Commission must ensure that the outcome meets "the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." 47 U.S.C. § 252(c)(1). The Commission also has jurisdiction to review any rates proposed within the arbitration. *Id*. § 252(c)(2).

EVIDENCE RELIED UPON

The Parties have each designated the record from one previous hearing before another state commission in this arbitration to be entered as evidence in this proceeding. Joint Petitioners selected and filed the record from the hearing before the Georgia Public Service Commission, and BellSouth selected and filed the record from the Florida Public

Service Commission. In addition, the one-day hearing before this Commission, held June 1, 2005, resulted in a transcript and a limited number of exhibits. This brief will incorporate all three of these records.

For ease of reference, Joint Petitioners provide the following key to the citations to the various sets of evidence relied upon in this brief:

Transcript of Proceedings, South Carolina Public Service Commission (June 1, 2005)	SC Tr.
Joint Petitioner Exhibits, South Carolina Public Service Commission (June 1, 2005)	SC JP Exhibit
BellSouth Exhibits, South Carolina Public Service Commission (June 1, 2005)	SC BST Exhibit
Transcript of Proceedings, Georgia Public Service Commission (Feb 8-10, 2005)	GA Tr.
Joint Petitioner Exhibits, Georgia Public Service Commission (Feb 8-10, 2005)	GA JP Exhibit
BellSouth Exhibits, Georgia Public Service Commission (Feb 8-10, 2005)	GA BST Exhibit
Transcript of Proceedings, Florida Public Service Commission (Apr. 26-28, 2005)	FL Tr.
Joint Petitioner Exhibits Florida Public Service Commission (Apr. 26-28, 2005)	FL JP Exhibit
BellSouth Exhibits Florida Public Service Commission (Apr. 26-28, 2005)	FL BST Exhibit

In addition, this brief will include references to the transcripts of depositions taken by the parties. Joint Petitioners were deposed December 14-17, 2005, and BellSouth's witnesses were deposed June 28-29, 2005, and December 8-10, 2005. The deposition transcripts have been included in the South Carolina record.

Please note that all cites to pre-filed written testimony by any party refer only to testimony filed with this Commission, unless otherwise specified.

At the hearing held on June 13, 2006, Susan Berlin, Vice President and Senior Regulatory Counsel for NuVox, adopted the pre-filed written Rebuttal Testimony and live June 1, 2005 hearing testimony of Joint Petitioner/NuVox witness Hamilton Russell. Joint Petitioners note Ms. Berlin's adoption of this testimony where cited in this brief.

DISCUSSION

Item No. 4, Issue No. G-4 *[Section 10.4.1]: What should be the limitation on each Party's liability in circumstances other than gross negligence or willful misconduct?*

POSITION STATEMENT: Liability for negligence should be limited to an amount equal to 7.5% of the aggregate fees, charges or other amounts billed for any and all services provided or to be provided pursuant to the Agreement as of the day the claim arose.

A Party Is Entitled to Some Relief for Harm Caused by the Other Party's Negligence.

The dispute in this item is whether the Agreement should provide any remedy for harm caused by the negligence of either party. Joint Petitioners have proposed language that would provide a maximum of 7.5% recovery to an injured party, calculated from the total revenue received and/or billed as of the date the negligence took place ("the day the claim

arose"). Exhibit A at 1.[2] This provision is commercially reasonable in this context, and reflects settled principles of contracts law.

A simple example illustrates how Joint Petitioners' language would operate. Surmise that on Day 61 of the Agreement, a DS3 dedicated transport facility was negligently disconnected by BellSouth, leaving 50 Petitioner customers without service for 24 hours. As of Day 61, that Joint Petitioner had paid $1 million to BellSouth, with another invoice for $500,000 pending. If proven to be at fault, BellSouth would be liable for a maximum of 7.5% of $1.5 million, or $112,500, for that outage. The negligent party would thus pay the damages **proved before a competent tribunal** up to that maximum amount. Joint Petitioners' proposal "would only come into play in an instance where Bellsouth is negligent in performing a service that a [Joint Petitioner] pays for, and the [Joint Petitioner] …has to pay money, essentially, because of a BellSouth act of negligence." SC Tr. at 395:17-21.

Today, Joint Petitioners are not even granted this minimal level of relief in their interconnection agreements when they suffer harm through BellSouth's negligence, which has happened before in South Carolina. SC Tr. at 395:17 – 396:10. Any harm that BellSouth negligently causes becomes Joint Petitioners' burden, including any liability they incur and any revenue they lose as a result of service degradation or disruption. This inequity does not exist in other commercial contexts — including Joint Petitioners' contracts with customers and vendors — and moreover does not reflect the settled law of contracts. And the fact that BellSouth has always been able to impose such harsh liability terms does not make them any less improper. To resolve this problem, Joint Petitioners have proposed a limited right to

[2] As the Commission is aware, negotiations have continued since the hearing, which was held June 1, 2005. Joint Petitioners therefore attach the most recent version of Exhibit A that incorporates the very latest proposals made by both BellSouth and Joint Petitioners.

damages for negligence, capped at 7.5%, that reflects general principles of contracting as well as an incremental move toward commercially reasonable liability terms typically seen in contracts between service providers.

Section 373 of the Second Restatement on Remedies states that an "injured party is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance." Rest. II Remedies § 373(1). Thus, money paid by a party to a vendor for services rendered is subject to restitution if the party were injured by the vendor's conduct or performance. BellSouth's "bill credits" proposal comports with the precept that one is not entitled to payment for services not properly rendered. However, this principle does not stand for the notion that liability for harms caused by the negligent provision of services should be eliminated (which is the essence of BellSouth's proposal).

BellSouth asserts that its proposed language, which provides no relief for harm caused by negligence, is "industry standard." Direct Testimony of Kathy Blake at 12:3-4 (May 11, 2005) ("Blake Direct Test."). This assertion is incorrect. First, Ms. Blake has not denied that BellSouth itself gives other customers more favorable liability terms in custom contracts. She in fact acknowledged that such favorable terms may be offered where "other provisions in there … justify accepting that additional risk." GA Tr. at 1000:11-14. (Ms. Blake unable to state under oath that "every contract BellSouth has with every customer … is exactly like this [BellSouth proposal].").[3] And where BellSouth does give more favorable limitation-of-liability language to a customer, while simultaneously holding Petitioners to the elimination-of-liability language it proposes here, BellSouth precludes Petitioners from

[3] Ms. Blake made a similar statement at the South Carolina hearing: "I can't say 100% we do or we don't" (responding to the question, "isn't it true…BellSouth may, and in fact does, negotiate limitation of liability terms in its CSAs here in the state of South Carolina?"). SC Tr. at 407:21-25.

bidding effectively for that customer. At hearing, NuVox described the Request for Proposal process that large end users, such as a university, employ to find vendors, and explained that being hamstrung from providing any modicum of relief for failed service ensures that a carrier will not win the bid. SC Tr. at 410:7-12 (B. Russell, adopted by S. Berlin). Moreover, some end users, such as military bases, absolutely require vendors to guarantee more relief than mere bill credits. *Id*. at 413:7-12.

Secondly, Joint Petitioners presently have contracts with telecommunications service providers that provide damages for harm caused by simple negligence. These contracts also contain deviations from the standard claimed by BellSouth. Even Xspedius's template contract, for example, provides a limitation of liability for "mistakes, omissions, interruptions, delays, errors or defects in the service" that is capped at "$100,000 or five (5) months' worth of paid monthly recurring charges." **Attachment 1** (XSP 000004-5). Thus, just as BellSouth is no longer "the [only] phone company", the BellSouth standard (which evidently remains standard for BellSouth only in certain contexts) is no longer the industry standard.[4]

Indeed, the AllTel-NewSouth interconnection agreement diverges from BellSouth's purported "industry standard." *See* Exhibit B to Joint Petitioners' Direct Testimony (May 11, 2005). This agreement provides liability up to $250,000 for harm caused by negligence; it does not limit recovery to bill credits. SC Tr. at 391:25 – 392:4 (B. Russell, adopted by S. Berlin). Thus, BellSouth's proposed liability language is not only contrary to the standard in

[4] BellSouth was unable to deny that it enters into custom contracts that deviate from its claimed standard. GA Tr. at 999:11-12 (Blake) ("I'm not familiar with any of the details in a specific contract or arrangement."); FL Tr. at 947:18-22 (Blake) ("I don't know the details of every contract service arrangement.").

the telecommunications industry, it is not the standard even in the more specialized realm of interconnection agreements.

To the extent that Joint Petitioners' tariffs provide only bill credits for harm caused by their own negligence, those tariffs are often not incorporated into actual user agreements. *See generally* GA Tr. at 383:13 – 384:10 (Russell). As Mr. Russell explained in Georgia, "it is a customary practice with the company to make modifications" to standard liability terms "where a potential customer may be receiving alternative proposals from different carriers." GA Tr. at 384:3-6. And in Florida, Mr. Russell explained that NuVox will "provide additional amounts in the event of service outages" in order to make customers whole. FL Tr. at 184:18. *See also* GA Tr. at 386:23-25 ("It is our policy and procedure at the company to make changes to customer service agreements.").

Bill credits often are not the only recovery that NuVox customers receive. Thus, it is not the case, as BellSouth seeks to imply, that Joint Petitioners are requesting more beneficial liability language than what they themselves provide to their own customers (even if the comparison of wholesale to retail service offerings were appropriate, which it is not). And in the many instances in which Joint Petitioners have given customers more than mere bill credits to cover their injury, BellSouth's elimination-of-liability clause would not, as Ms. Blake admitted in Georgia, make Joint Petitioners whole when BellSouth's negligence caused the problem. GA Tr. at 998:12-16.

It is moreover not appropriate to compare the terms of Joint Petitioners' retail service contracts with the terms that they seek to incorporate into this wholesale Agreement. Joint Petitioners are competitive providers of retail telecommunications services – they are not retail customers. *See* GA Tr. at 383:10-11 (Russell) ("What we're arbitrating today is a

carrier agreement."). BellSouth, by contrast, is the incumbent that acts as a wholesale supplier to Joint Petitioners, and yet competes with them in the retail market. Thus, the terms imposed on Joint Petitioners have a pass-through effect on their customers, which impacts both their customers and the South Carolina telecommunications market generally. The same is not true of the Joint Petitioners tariffs or the actual contracts Joint Petitioners sign with their customers.[5]

The Proposed 7.5% Liability Cap for Negligence Is Appropriate in this Context.

Service contracts generally include liability terms that provide relief for harm caused through negligence. NuVox's witness explained at hearing the fact that Joint Petitioners' proposal is reasonable based on NuVox's agreements with "other service providers [and] software companies." SC Tr. at 399:2-3 (B. Russell, adopted by Berlin). Joint Petitioners' prefiled testimony discussed these contracts, which often include liability for negligence up to "15% to 30% of the total revenues actually collected or otherwise provided for over the entire term of the relevant contract." Joint Petitioner Direct Testimony at 24:16-18 (May 11, 2005) ("JP Direct Test.").

What Joint Petitioners propose is a hybrid, or compromise, between the liability provisions of these contracts and the present-day terms under which BellSouth has for too long enjoyed a complete elimination of liability for negligence. *See* JP Direct Test. at 23:10-14. This 7.5% cap is a reasonable step toward what is commercially reasonable, given that Joint Petitioners had researched the issue and found that their agreements with other service providers "had 30% of the contract would be available, instances here 50% of the price of the

[5] Very few Joint Petitioner customers purchase services out of tariffs. For example, Mr. Russell of NuVox noted at hearing in Georgia that "99 percent of our customers purchase out of customer service agreements but do not purchase services out of our tariff." GA Tr. at 381:19-22.

contract would be available." SC Tr. at 399:7-9 (B. Russell, adopted by S. Berlin). In addition, it strikes a reasonable and proportional balance between the risk of incurring harm versus the revenues that will be generated under this Agreement. *See id*. at 24:10-22.

As NuVox explained at hearing, this issue "is very important to our company." SC Tr. at 391:16 (B. Russell, adopted by S. Berlin). NuVox has already experienced "instances in Pickens County where BellSouth's acts of negligence have forced upon [it] liability." *Id*. "All we're asking for is when BellSouth is negligent, that we have the ability to recover some damages," NuVox explained. *Id*.

BellSouth continues to misapprehend (or misrepresent) how this 7.5% cap will operate. It is obviously not the case, as counsel for BellSouth nevertheless disingenuously attempted to show at hearing, that BellSouth is automatically liable for 7.5% of all billed revenue. *See* SC Tr. at 400:7-12 (Meza). Thus, the fact that Joint Petitioners may pay millions of dollars to BellSouth under the Agreement, based on current invoices, does not mean that BellSouth's liability in the last year of this Agreement would certainly be millions of dollars. SC Tr. at 400:18-24. Rather, **BellSouth would be liable only for the amount of damages that a Joint Petitioner actually incurred (and proved before an appropriate regulatory agency or court) due to BellSouth's negligence – up to a 7.5% cap**. As Mr. Russell explained to the Florida Commission, "it is not as if over the course of this contract we are going to get an $8.1 million rebate from BellSouth." FL Tr. at 274:9-11. Stated differently, as Mr. Russell explained in Georgia, if a Joint Petitioner paid out $60 to a customer injured through BellSouth's negligence, "then BellSouth's liability, if you will, to NuVox would be $60. It would not be 7.5 percent of $3 million." GA Tr. at 404:10-11.

In addition, BellSouth (or a Joint Petitioner) **pays out only if it is negligent**. As Mr. Falvey explained at hearing, "This provision would only come into play in an instance where BellSouth is negligent in performing a service that a CLEC pays for." SC Tr. at 395:17-19. *See also* GA Tr. at 577:12-13 (Johnson) ("if each party acts responsibly, this provision never kicks in"). Moreover, even Ms. Blake agreed in Georgia that BellSouth is "not going to have any risk" unless it fails to exercise appropriate care and is negligent. GA Tr. at 1004:24 – 1005:1. BellSouth counsel's disingenuous attempt to startle the panel with liability figures in the millions is therefore concededly hyperbolic and, in any event cannot be separated from the fact that no BellSouth liability is triggered without BellSouth negligence (which should be BellSouth's cost and not that of the Joint Petitioners).

BellSouth's proposal is not a limitation-of-liability clause, but rather an "elimination of liability" clause. JP Direct Test. at 23:13-14. ***It places the entire risk of BellSouth's own negligence on Petitioners.*** This result is inappropriate in what should be "an arm's-length contract between commercially sophisticated parties." *Id*. at 22:19. Joint Petitioners thus seek "some measure, albeit a modest one relative to universally-regarded commercial practices, of accountability and contractual responsibility." *Id*. at 23:20-21. BellSouth should not be shielded from all liability for its own negligence simply because this is an Interconnection Agreement, or because it has always been shielded in this way.

BellSouth has also objected to Joint Petitioners' 7.5% liability cap on the ground that the revenues it will obtain under this Agreement are TELRIC-based and do not cover that exposure. Blake Direct Test. at 16:9-11. BellSouth's witness had no basis upon which she could support that objection (she does not know what goes into TELRIC rates) and conceded at hearing in Georgia, however, that "I know there's shared and common costs that would

account for" the costs of insurance. GA Tr. at 1002:15-16 (Blake). Joint Petitioners' testimony to this Commission contained this same acknowledgement. Joint Petitioner Rebuttal Testimony at 18:21 (May 23, 2005) ("JP Rebuttal Test.") ("BellSouth no doubt already carries insurance which is factored into its TELRIC pricing."). In any event, the TELRIC pricing rules do not allow for BellSouth to recover the costs of damages it imposes on Petitioners through its own negligent acts. TELRIC allows for recovery of the forward looking costs of providing an element; it does not allow for recovery of the costs of failing to provide that element properly due to negligence. *See* 47 C.F.R. § 51.505 (describing appropriate elements of network costs).

BellSouth's latest retort to Joint Petitioners' proposal is that interconnection agreements are not a typical commercial arrangement. SC Tr. at 406:8 (Blake). *See also* GA Tr. at 390:20-21 (Meza) ("true commercial contracts"). BellSouth apparently believes that this declaration absolves it of any obligation to provide redress for its own negligence. There is no legal basis for this position. Indeed, the fact that this agreement in an interconnection agreement – impacting the telecommunications services that Joint Petitioners are providing to South Carolina consumers – makes it all the more necessary that BellSouth provide such redress. It is for this very reason that BellSouth is, as counsel observed in Georgia, subject to regulation. *See, e.g.*, GA Tr. at 392:18-20 (noting that SEEMS penalties apply to BellSouth).[6]

[6] As Joint Petitioners explained at the hearing, SEEMS penalties do not resolve, or even address, their need to receive some modicum of remedy when they are injured by BellSouth's negligence. SEEMS penalties often are payable to the resident State Commission, and are triggered only when BellSouth's average or aggregate performance in a specific regard meets some predetermined threshold. SEEMS payments are not triggered by individual negligent acts and the predetermined penalty figure is in no way tied to the damages incurred as a result of negligent performance. It is highly probable that a negligent act by BellSouth would not trigger SEEMS, though it may cause costly damage to a Joint Petitioner. Seeking redress for those specific and

Yet the degree of regulation imposed on BellSouth — particularly with respect to pricing — has diminished substantially since passage of the 1996 Act. Previous regulatory theory had advised that utilities were owed a certain degree of freedom from liability in exchange for regulatory constraints. *See* Rendi L. Menn-Stadt, *Limitation of Liability for Interruption of Service for Regulated Telephone Companies: An Outmoded Protection?*, 1993 U. Ill. L. Rev. 629, 640 (1993) (appended hereto as **Attachment 2**). Thus, a regulated telephone company "is charged with the duty of providing service upon application, but in exchange for such responsibility, [it] will not be required to provide completely uninterrupted or perfect quality service." *Id.* That theory no longer holds true, however, in an environment where BellSouth has obtained interLATA relief and considerable pricing flexibility. *See id.* at 644-45. Indeed, BellSouth's relationship with the Joint Petitioners involves significant billings offered pursuant to very relaxed regulation by the FCC. In this environment, a rebalancing is warranted. *See id.*

This rebalancing is especially warranted in the case of this Agreement, which will involve provision of elements and services that are no longer at TELRIC prices (*e.g.* certain interconnection trunks and facilities, as well as section 271 network elements). And under the FCC's *Triennial Review Remand Order*, many more of the elements that Joint Petitioners use have been removed from the UNE list. Having achieved a much less regulated pricing

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proven damages caused by BellSouth's negligent acts is fundamentally different than imposition of penalties under the SEEMs plan (which may be viewed by BellSouth simply as a cost of doing business). Moreover, SEEMS is part of a voluntary package of regulatory measures that allowed BellSouth into the very lucrative long distance and bundled services markets. *See* SC Tr. at 394:21-22; 395:7-12 (BellSouth accepted SEEMs in order "[t]o get into long distance, which is a billion dollar a year industry for BellSouth.") (B. Russell, adopted by S. Berlin). And SEEMS is triggered and paid out only in the aggregate – injured CLECs do not themselves recover anything. *Id*. at 394:22-24. As Mr. Russell aptly explained at the hearing in Georgia, SEEMS is irrelevant to Issue 4 at the Georgia hearing – "because this provision applies reciprocally to BellSouth, that's a different relationship altogether." GA Tr. at 393:2-19.

regime for a variety of services available under the Agreement, BellSouth should be subject to liability terms that are commercially reasonable and that better reflect the new regulatory environment.

"The Day the Claim Arose" Provides a Date Certain for Calculating a Party's Liability.

Joint Petitioners' proposed language marks liability from "the day the claim arose." This phrase refers to the day on which the negligent act occurred. This concept ensures that the parties can identify a date certain from which to calculate damages.

BellSouth argues that Joint Petitioners' language "serves only to encourage CLECs to game the claims and litigation process[.]" Blake Direct Test. at 13:5. Ms. Blake largely recanted this opinion at hearing in Georgia, acknowledging that BellSouth's interpretation of Joint Petitioners' proposed language was incorrect. GA Tr. at 1004:13-23. She also agreed there that "if a circuit went down on account of BellSouth's negligence, we could easily figure out and agree on the date the claim arose." GA Tr. at 1005:14-17.

Moreover, BellSouth is incorrect as a matter of law. The Uniform Commercial Code states that "[a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." U.C.C. § 2-725(2). Thus, it is recognized that "damages are generally measured as of the date of the breach," though greater damages may be awarded. Samuel Williston, A Treatise on the Law of Contracts, Section 64.4 (4th ed. 2002). Joint Petitioners' language mirrors that rule, and leaves no room for delaying a claim to obtain unfair advantage.

It will be evident, under this Agreement, when a claim arises. This Agreement involves the operation of a closely monitored communications network. In fact, BellSouth is required by law to be actually aware of any network outages and to remedy them quickly.

E.g., 47 C.F.R. § 63.100 (federal outage reporting requirements); South Carolina Code of Regulations 103-653 ("Trouble Reports") (requiring utilities to create and retain outage reports for Commission inspection). Thus, BellSouth will know when a breach of service has occurred, even if Joint Petitioners do not. BellSouth's objection that Joint Petitioners will or could "game the system" under their proposed language is therefore meritless.

For all these reasons, the Commission should adopt Joint Petitioners' position and language for Item 4.

> ***Item No. 5, Issue No. G-5*** *[Section 10.4.2]: To the extent that a Party does not or is unable to include specific limitation of liability terms in all of its tariffs and End User contracts (past, present and future), should it be obligated to indemnify the other Party for liabilities not limited?*

POSITION STATEMENT: Joint Petitioners should be able to offer commercially reasonable limitation-of-liability terms to their customers without being penalized by BellSouth by being forced to indemnify it. Joint Petitioners require this flexibility in negotiations in order to compete fairly with BellSouth in response to demands for custom contracts.

Petitioners Should Not Be Required to Mirror BellSouth's Limitation-of-Liability Terms In Order to Avoid Incurring an Additional Obligation to Indemnify BellSouth.

This item arises from BellSouth's unreasonable and heavy-handed insistence that Joint Petitioners include limitation-of-liability language in their ***contracts and tariffs*** that is exactly as stringent as BellSouth's ***tariffed*** limitation of liability provisions. If Joint Petitioners do not include liability language in all of their service arrangements (which predominantly are custom contracts known as CSAs) that virtually mirrors BellSouth's tariff language, for the entire duration of this Agreement, then BellSouth would make Joint Petitioners pay any damages awarded for negligence *attributable to BellSouth*. In short, BellSouth seeks to have Joint Petitioners pay any and all claims attributable to *BellSouth's*

negligence, simply because, if BellSouth retained a complete monopoly, it would limit its liability completely in its tariffs – and everybody would be served out of those tariffs. But BellSouth does not retain a complete monopoly and it is unable to assert that it subjects all of its own customers to the same rigid limitation of liability provisions contained in its tariffs. GA Tr. at 999:11-12 (Blake) ("I'm not familiar with any of the details in a specific contract or arrangement."); *see id*. at 1000:8-23. Indeed, it is all but certain that BellSouth, too, negotiates limitation-of-liability provisions when competing with CLECs for a custom contract customer; Joint Petitioners are unable to state with certainty what the terms of those contracts may be, because, as Mr. Russell stated, "when BellSouth has contract service arrangements, they frequently file those as trade secrets or under seal." Transcript of Kentucky Hearing, Case 2004-0004, at 65:1-3 (**Attachment 3**). Thus, by its proposed language, BellSouth simply seeks to create an uneven playing field and make it more difficult for Joint Petitioners to compete.

Joint Petitioners presently have commercially reasonable limitation-of-liability terms in their tariffs, template contracts and CSAs. GA Tr. at 406:10-16 (Russell); FL Tr. at 203:14-16 (Russell). None of the Joint Petitioners intend to remove their limitation-of-liability language from their tariffs or template contracts altogether. GA Tr. at 406:17-19; FL Tr. at 203:19 – 204:2. However, Joint Petitioners must continue to respond to the demands of a competitive marketplace wherein customers insist on negotiating CSAs with less stringent limitation of liability provisions. Joint Petitioners noted at hearing that it is common for standard liability terms to be changed when submitting Requests for Proposal (RFPs), especially when dealing with public entities. *See* SC Tr. at 410:7-12; 413:7-20. As Joint Petitioners have explained from the beginning, they will ensure that their terms and

conditions of service will "adhere to these existing standards of due care, commercial reasonableness, and mitigation." JP Direct Test. at 30:14-15.

Indeed, even without any proposed contract language for this issue, Joint Petitioners believe that it is incumbent upon them to incorporate "commercially reasonable" limitation of liability terms in all tariffs and contracts. Moreover, Joint Petitioners have made clear to BellSouth that it remains protected by "existing provisions of the Agreement and applicable commercial law stipulating that a Party is precluded from recovering damages to the extent it has failed to act with due care and commercial reasonableness." JP Direct Test. at 30:10-13.

Yet, limitation-of-liability language is among the terms that Joint Petitioners presently must negotiate in order to win customers. GA Tr. at 407:7-15 (Russell); FL Tr. at 206:4-11 (Russell); SC Tr. at 413:17-20 ("It's being able to meet competitors' offerings where they're willing to change liability limitations along with competitive offerings on waiver of deposit or price or other terms"). Presently Joint Petitioners provide a great proportion of their service via individual agreements, and not tariffs. GA Tr. at 381:20-23 (Russell) ("99 percent of our customers purchase out of customer service agreements"); FL Tr. at 203:22-24; SC Tr. 412:17-18 (Russell adopted by Berlin) ("99 percent of our customers have customer specific contracts"). Joint Petitioners are "in the competitive environment," which the 1996 Act established affirmatively to supplant the former monopoly environment BellSouth had enjoyed for so long, yet, with this issue, "[w]e're talking about a competitive situation where BellSouth is attempting to dictate the terms that NuVox can afford to its customers[.]" GA Tr. at 408:5-7. BellSouth's position seeks to nullify the 1996 Act and to restore vestiges of its monopoly legacy which were supplanted by the Act. This position is contrary to the federal scheme and is thus unlawful. Joint Petitioners thus request

the ability continue to negotiate commercially reasonable limitation-of-liability terms with potential and existing customers without facing financial and anticompetitive retribution from BellSouth in the form of an indemnity obligation.

Liability terms are frequently negotiated such that they are different from the template limitation of liability terms in Joint Petitioners' tariffs. *Compare* **Attachment 1** (XSP 00004-5) *with* **Attachment 4** (excerpts of tariffs) (XSP 000023, 39, 48, 56, 64, 72, 81 BellSouth's proposed language would punish Joint Petitioners for providing consumers with commercially reasonable terms reflective of a competitive marketplace. It would require Joint Petitioners to cover BellSouth for BellSouth's own negligent, reckless, or unlawful conduct for refusing to be "contractually bound," as Mr. Russell put it (GA Tr. at 410:1), to BellSouth's own stringent limitation-of-liability language that it imposes on (too) many South Carolina consumers. *See also* JP Direct Test. at 31:7-8 (such a requirement is "unreasonable, anti-competitive and anti-consumer"). Joint Petitioners are committed to including **commercially reasonable** limitation-of-liability terms in their tariffs and contracts,[7] and the Commission should not force them to do more. Joint Petitioners should not be punished for competing with BellSouth.

But this appears to be exactly BellSouth's intent. Ms. Blake stated in her witness summary that "the purpose of this provision is to put BellSouth in the same position it would be in if the Joint Petitioners' end user was a BellSouth end user." SC Tr. at 351:8-11. In other words, if BellSouth loses a customer because Joint Petitioners provide them greater

[7] BellSouth's persistent suspicion that Joint Petitioners will give customers terms such as "I'm going to give you $5,000, customer, if I fail to provide you service on a particular date," is simply, as Mr. Russell put it, "a **ridiculous hypothetical**." GA Tr. at 403:14-15. "[W]e've never done that, we have no plans to do so." *Id*. at 403:11-12. Moreover, it has nothing to do with negligence or this issue.

protection from injury, BellSouth wants someone to pay. It wants to penalize Joint Petitioners. And BellSouth wants this despite the fact that Ms. Blake admitted to Commissioner Baker of the Georgia Commission that she is not aware of any "litigation that arose from a CLEC's customer against BellSouth." GA Tr. at 1015:13-18.

BellSouth's unjustified purpose and position is bad for consumers, bad for competitors, and bad for the South Carolina telecommunications market. The Commission should therefore adopt Joint Petitioners' position and proposed language for Issue 5.

Item No. 6, Issue No. G-6 *[Section 10.4.4]: Should limitation on liability for indirect, incidental or consequential damages be construed to preclude liability for claims or suits for damages incurred by CLEC's (or BellSouth's) End Users to the extent such damages result directly and in a reasonably foreseeable manner from BellSouth's (or CLEC's) performance obligations set forth in the Agreement?*

POSITION STATEMENT: The Agreement should be clear that damages to end users that result directly, proximately, and in a reasonably foreseeable manner from a party's performance do not constitute "indirect, incidental, or consequential" damages. Petitioners should not be barred from recovering such damages subject to the Agreement's limitation of liability for negligence.

Damages That Are Reasonably Foreseeable and Direct Are Not "Indirect, Incidental, and Consequential" and Thus Should Not Be Precluded by the Agreement.

Item 6 is in large measure a definitional issue: how should indirect, incidental, and consequential damages be defined for purposes of the Agreement? These are damages for which neither Party will be liable to the other. Because of this completely preclusive effect, Joint Petitioners seek to define them in a manner that does not unfairly deprive any party of damages which are indeed reasonably foreseeable. Moreover, Joint Petitioners seek to avoid any misperception or to lend any credence to arguments that BellSouth may make now or in the future that the parties somehow herein agreed in some manner to curtail the legal rights of

Joint Petitioners' South Carolina customers. Accordingly, Joint Petitioners insist on this clarification, which reflects the extent and limit of their voluntary agreement with BellSouth to waive certain damages claims: "[d]amages to customers that result directly, proximately, and in a reasonably foreseeable manner from BellSouth's (or a CLEC's) performance of obligations set forth in the Agreement … should be considered direct and compensable under the Agreement for simple negligence or non-performance purposes[.]" JP Direct Test. at 33:3-10.

Joint Petitioners' language for Section 10.4.4 states that indirect, incidental and consequential damages do not include damages that "result directly and in a reasonably foreseeable manner from the first Party's performance of services hereunder." Direct and reasonably foreseeable damages are those for which contracting parties are responsible when they are a direct and anticipated result of a failure to perform by acting negligently, recklessly, or in a manner that violates the law. If damages are 'direct' and 'reasonably foreseeable,' they cannot be deemed 'indirect' or 'incidental' or 'consequential.' These damages are "an appropriate risk to be borne by any service provider in a contract that clearly envisions that the effect of performance or nonperformance of such services will be passed through to ascertainable third parties[.]" JP Direct Test. at 33:17-20.

So, to the extent that the reasonably foreseeable damages contemplated by Joint Petitioners' proposed language may be characterized as indirect, incidental or consequential, Joint Petitioners do not voluntarily agree to absolve BellSouth of these damages. Thus, for example, if through BellSouth's conduct the services NuVox provides to a hospital were to go down, NuVox should not be "left holding the bag" for the injury incurred by that hospital. GA Tr. at 413:19-20 (Russell).

BellSouth knows that Joint Petitioners rely on BellSouth's bottleneck facilities, such as loops and transport between wire centers, in order to serve customers. 47 U.S.C. § 251(c). As such, BellSouth's acts and omissions foreseeably and directly impact Joint Petitioners' ability to do business and serve customers. Were BellSouth's facilities to go down, Joint Petitioners must attempt to obtain alternate services as cover, if at all possible. They may also be required to give credits and additional redress to their customers for any outage. If the outage was caused by BellSouth's negligence, recklessness, or willful misconduct, BellSouth should compensate Joint Petitioners for the losses they incur therefrom. Such losses are reasonably foreseeable and flow directly from BellSouth's – not Joint Petitioners' – conduct. Unless BellSouth compensates Joint Petitioners for those losses, it will improperly inflate Joint Petitioners' costs and impede their ability to deploy facilities and serve customers.

BellSouth's principal objection to Joint Petitioners' language is that its corporate witness assigned to the issue found the proposed language to be "quite confusing." GA Tr. at 1022:8 (Blake). *See also* FL Tr. at 953:6 (Blake). In fact, its corporate witness admits not to understand what indirect, incidental, or consequential damages are (despite the fact that she was offered as the most knowledgeable BellSouth witness for depositions on this issue). GA Tr. at 1020:8-21 (Blake). Yet she somehow maintains that the language "kind of doesn't really do anything," *id*. at 1021:10, but only in her "layman's reading." *Id*. at 1021:23. Indeed, Ms. Blake stated four times to the Georgia panel during the colloquy on Item 6 that she is not an attorney. GA Tr. at 1020:11, 1021:23, 1022:7-8, 1023:3. BellSouth's position on Item 6 is thus no position at all, as they have no grounds to reject Joint Petitioners' language other than because it is "lengthy." GA Tr. at 1022:7; Transcript of Deposition of

Kathy Blake at 305:23-25 (Dec. 8, 2004) ("Blake Depo."). Not surprisingly, the Georgia Commission rejected BellSouth's position and adopted in large part, the Joint Petitioners' language proposal, with a single modification. *See Joint Petition for Arbitration of NewSouth Communications Corporation et al. of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as amended*, Docket No. 18409-U, Order on Unresolved Issues at 5-7 (Ga. P.S.C. July 7, 2006) ("*Georgia Order*") (excerpt of this order attached hereto as **Attachment 5**)

Joint Petitioners must not be left without relief when BellSouth's conduct results in direct, reasonably foreseeable damages. The relief requested here is necessary to preserving competition in this state. Accordingly, Joint Petitioners' position and language for Section 10.4.4 of the General Terms and Conditions should be adopted for the Agreement.

Item No. 7, Issue No. G-7 *[Section 10.5]: What should the indemnification obligations of the parties be under this Agreement?*

POSITION STATEMENT: The Party receiving services should be indemnified, defended and held harmless by the Party providing services against any claims, loss or damage to the extent reasonably arising from or in connection with the providing Party's negligence (subject to limitation of liability for negligence), gross negligence or willful misconduct.

It Is Reasonable and Appropriate in this Agreement for the Provisioning Party to Bear the Risk of Its Own Services.

Joint Petitioners' proposed language for Section 10.5 provides that the party providing service must indemnify the other party for damages caused in providing that service. This language comports with industry practice as reflected in Joint Petitioners' own tariffs and contracts, and rests on the same commonsense notion, expressed above with respect to Item 4, that parties must be responsible for damages that they cause by their own acts and omissions. As Joint Petitioners have stated, "[a] Party that fails to abide by its legal

obligations should incur the damages arising from such conduct. A Party that is negligent should bear the cost of its own mistakes." JP Rebuttal Test. at 29:15-17.

BellSouth and Joint Petitioners agree that the party **receiving** service should indemnify the party **providing** service for damages caused by the **receiving party's own unlawful conduct**. Exhibit A at 4. *See also* GA Tr. at 1030:23-25(Blake); JP Rebuttal Test. at 29:8-11. And in fact, Joint Petitioners presently impose this same indemnification obligations in their tariffs and contracts, demonstrating that, contrary to BellSouth's insistence, **forcing a receiving party to indemnify the service provider for the service provider's negligence is not "the standard in the industry."** SC Tr. at 352:13-14 (Blake Summary). For example, Xspedius's tariffs state that the company does not indemnify customers for damages caused by "the negligent or intentional act or omission of the Customer, its employees, agents, representatives or invitees" or the customer's infringement of patents, copyrights or trade secrets. **Attachment 4**. And Xspedius's template customer contract requires the customer to indemnify Xspedius for any loss that "arises out of, or is directly or indirectly related to, … any act or omission of Customer."

Where the Parties diverge is with respect to instances where the **providing** party is negligent. In that instance, BellSouth insists that the receiving party (most often a Joint Petitioner) should indemnify the providing party (most often BellSouth) for the providing party's negligence. That is backwards, and is contrary to both law and common sense. As Petitioners stated at hearing, "[t]here is no obligation in the Act or elsewhere that suggests [Joint Petitioners] must take on the burden of indemnifying BellSouth for their own negligence, gross negligence or willful misconduct." SC Tr. at 200:18-21 (R. Russell, adopted by S. Berlin).

Such indemnification arrangements are also not "industry practice." For example, a sample NewSouth contract produced to BellSouth states that "NewSouth hereby assumes liability for, and shall indemnify, defend, protect, save and hold harmless Customer … from and against any and all third party liabilities, claims, judgments, damages and losses." **Attachment 6** (NVX 00051-52) [filed under seal].[8] In addition, neither the Xspedius tariff nor its template contract requires customers to indemnify the company for damages caused by the company's service. *See* Attachment 3. These examples demonstrate what seems axiomatic: a party that provides services cannot expect indemnification from its customers when it was the providing party's conduct that caused the harm. As Joint Petitioners' testimony explains, "in virtually all other commercial-services contexts, the service provider, not the receiving party, bears the more extensive burden on indemnities." JP Direct Test. at 37:8-10. And as noted at hearing, where Joint Petitioners are purchasing services from BellSouth, "[i]f BellSouth does something to cause damage directly to [Joint Petitioners], [Joint Petitioners] should be able to look to BellSouth to indemnify [them] for the claims related to [its] negligence." SC Tr. at 427:14-17.

BellSouth's refusal to accept Joint Petitioners' language amounts to their foisting upon these CLECs the obligation to act as BellSouth's insurance carrier. It means that when BellSouth or its service causes harm, Joint Petitioners must pay. This cannot be the right result in any commercial context, even a regulated one.[9] **Not surprisingly, every single**

[8] NuVox requested by letter dated May 26, 2005, that this document, as well as several others, be afforded confidential treatment. Docket No. 2005-57-C, Letter from John J. Pringle, Jr. to Charles L. A. Terreni (May 26, 2005) (Docket Item 174224). Hearing Officer Joseph Melchers granted this request by Directive dated May 31, 2005 (Docket Item 174263).

[9] In addition, BellSouth has deliberately left its proposal for Item 7 vague such that it may be construed to require Joint Petitioners to defend BellSouth and hold it harmless where BellSouth commits gross negligence or willful misconduct. Exhibit A at 4-5. Such a result would be unlawful and contrary to public policy.

commission to rule on this issue so far (Florida, Georgia, Kentucky, North Carolina and Tennessee, and Mississippi) has rejected BellSouth's position and has ruled in favor of the Joint Petitioners.[10]

In addition, forcing Joint Petitioners to indemnify BellSouth for damages that BellSouth causes runs exactly contrary to the longstanding legal principles discussed above with respect to Item 4. A party that contracts to provide goods or services is responsible for the damages it causes; at hearing, NuVox gave the example of a plumber that does negligent work and causes injury – plainly, as a matter of common sense, the plumber must indemnify the home owner for such harm. SC Tr. at 427:8-13 (B. Russell, adopted by S. Berlin). In

[10] The North Carolina Commission adopted Joint Petitioners' proposal for this issue. *See Joint Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth Communications, Inc.*, Docket No. P-772, Sub 8 *et al*., Recommended Arbitration Order at 15-16 (N.C.U.C. July 26, 2005) ("*NC Recommended Arbitration Order*"), *aff'd Joint Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth Communications, Inc.*, Docket No. P-772, Sub 8 *et al*., Order Ruling on Objections and Requiring the Filing of the Composite Agreement at 53-54 (N.C.U.C. Feb. 8, 2006) ("*NC Final Order*") (excerpts of these orders attached hereto as **Attachment 7**). The Kentucky Commission, upon reconsideration, also adopted Joint Petitioners' language proposal for this issue, finding that BellSouth, as the providing party, should indemnify the Joint Petitioners as the receiving parties to the extent they become liable due to BellSouth's negligence, gross negligence, or willful misconduct. *See Joint Petition for Arbitration of NewSouth Communications Corp. et al. of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as amended*, Case No. 2004-00044, Order at 4-5 (KY P.S.C. March 14, 2006) ("*KY Final Order*") (excerpt of this order attached hereto as **Attachment 8**). The Florida Commission reached a similar conclusion, finding that a party should be indemnified, defended and held harmless against any claims, loss or damage to the extent reasonably arising from or in connection with the other party's gross negligence or willful misconduct. *See Joint Petition by NewSouth Communications Corp. et al. for Arbitration of Certain Issues Arising in Negotiation of an Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. 040130-TP, Final Order Regarding Petition for Arbitration at 11-13 (FL P.S.C. Oct. 11, 2005) ("*FL Final Order*") (excerpt of this order attached hereto as **Attachment 9**). The Georgia Commission reached the same conclusion as the Florida Commission, additionally noting that parties should be held responsible for their own negligence. *See Joint Petition for Arbitration of NewSouth Communs., et al.*, Docket No. 18409, Order on Unresolved Issues, Document No. 93636 at 7-9 (Ga. P.S.C. July 7, 2006) ("*Georgia Order*") (**Attachment 5**). The Tennessee Regulatory Authority has not released a final order in the concurrent arbitration in that state between the Parties, but the Authority has rendered a vote in the arbitration proceeding finding that the interconnection agreement contain indemnification language which serves to indemnify either party in the instance that the other party's actions resulted in loss or damages to the first party, including loss or damages resulting from claims of third parties. *See Joint Petition for Arbitration of NewSouth Communications Corp. et al. of an Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. 04-00046, Transcript of Authority Conference at 9:25-12:18 (April 17, 2006) ("*TRA Conference Transcript*") (excerpt of transcript attached hereto at **Attachment 10**) (The TRA has not yet released its final order.).

any event, such a providing party should not be permitted to foist upon others an indemnification obligation that, in this case, would force Joint Petitioners to indemnify, defend and hold harmless BellSouth in cases where it is BellSouth's negligent conduct that causes the harm. Instead, just as an injured party is entitled to relief from the causing party, a party is entitled to indemnification from the causing party. It would be absurd and anomalous to hold the causing party liable in the first scenario, but not the second.[11]

For these reasons, Joint Petitioners' position and proposed language for Issue 7 should be adopted.

Item No. 9, Issue No. G-9 *[Section 13.1]: Should a court of law be included in the venues available for initial dispute resolution?*

POSITION STATEMENT: No legitimate dispute resolution venue should be foreclosed to the Parties and either Party should be able to petition the Commission, the FCC, or a court of competent jurisdiction for resolution of a dispute. The Commission should decline BellSouth's invitation to unlawfully strip state and federal courts of jurisdiction.

Joint Petitioners Should Not Be Forced to Give Up Their Legal Right to Go to Court.

The right to resolve disputes in a court of law belongs to everyone. Joint Petitioners are unwilling to give up that right, and they should not be forced to do so. Moreover, this Commission, as nearly all others to date have done,[12] should decline BellSouth's invitation to

[11] In order to further ensure that these provisions work in parallel fashion, Joint Petitioners have proposed that the 7.5% cap on liability for negligence also apply to indemnification for damages caused by negligence. Exhibit A at 4; GA Tr. at 37:19-22 (Russell Summary).

[12] The North Carolina Commission adopted Joint Petitioners' proposal for this issue. *See NC Recommended Arbitration Order* at 16-18 (excerpt of this order attached hereto as **Attachment 7**). The Florida Commission found that "either party should be able to file a petition for resolution of a dispute in any available forum," including a court of law. *See FL Final Order* at 13-15 (excerpt of this order attached hereto as **Attachment 9**). The Tennessee Regulatory Authority has not released a final order in the concurrent arbitration in that state between the Parties, but the Authority has rendered a vote in the arbitration proceeding finding that courts of law may be included as forums for initial dispute resolution of interconnection agreement disputes, although such a court may decline to exercise or determine that it lacks jurisdiction. *See TRA Conference Transcript* at 12:19-14:7 (excerpt of transcript attached hereto at **Attachment 10**).

strip federal and state courts of jurisdiction in any respect, as it is unlikely that the Commission may lawfully do so.

Joint Petitioners' existing agreements afford them the right to go to court, as BellSouth concedes. GA Tr. at 1036:20 (Blake) ("I believe it's in at least one of them."); FL Tr. at 965:14-16 (Blake) ("I have seen it in at least one of them I recall."). BellSouth's proposed language for Section 13.2 curtails that right, permitting the parties to go to court only "for such matters which lie outside the jurisdiction or expertise of the Commission or FCC." Exhibit A at 4-6. Thus, prior to filing any action, the parties must agree on the forum. *Id*. If the parties cannot reach agreement on the forum, BellSouth would force the parties to come to the Commission to resolve a dispute. And it is not even clear whether this would be a dispute over the appropriate venue for dispute resolution or the entire substantive dispute (giving BellSouth unilateral ability to deny Joint Petitioners the right to go to court).

Indeed, BellSouth's explanation of its proposed language is inconsistent (suggesting that those inside BellSouth cannot even agree as to what their own proposal means). That is, at the Florida hearing Ms. Blake stated that in the event of a choice-of-forum dispute, the party seeking to go to court would make "a simple filing … that says we don't think the appropriate jurisdiction is before the Commission; therefore, it should go to a court." FL Tr. at 12-15. Yet in Georgia, Ms. Blake flatly stated that if a party did not wish to defend in court, "then it would go to the Commission or the FCC. You wouldn't go to the Commission to dispute whether they have jurisdiction or not." GA Tr. at 1057:15-17. Ms. Blake's grossly inconsistent testimony demonstrates that its proposed language is susceptible of several meanings, enabling BellSouth to change its stance on choice of forum to suit its needs. For this reason alone, BellSouth's language is unacceptable and should be rejected.

In addition, Ms. Blake has twice admitted that BellSouth seeks to limit Joint Petitioners' rights to go to court in the event that a case belongs, in BellSouth's estimation, at a Commission. In Georgia she explained the deciding criterion as "if we don't agree with you that you claim the Commission doesn't have expertise or jurisdiction and we claim they do and our language prevails, then the matter would come before the FCC or the Commission." GA Tr. at 1058:2-5. In Florida, Ms. Blake outlined a similar intent to quash any efforts by Joint Petitioners to seek dispute resolution in a court of competent jurisdiction. FL Tr. at 971:14-16 (BellSouth would not consent to court jurisdiction "to the extent that the jurisdiction or expertise of the dispute is in the possession of the Commission or the FCC").

BellSouth's proposed gating criterion appears to be boundless, and may embroil every dispute between the parties, regardless of its genesis, to the forum-selection quagmire that Ms. Blake has envisioned. When asked at deposition when it would be discernible as to what type of complaint is not within the FCC's or a State Commission's jurisdiction, Ms. Blake answered "I can't think of any specific examples." Blake Depo. at 348:7-10 (Dec. 8, 2004). She could only generalize that "there could be some facets that aren't relative to interpretation or implementation" that fall outside agency jurisdiction. *Id.* at 348:11-13. Indeed, the only type of claim of which Ms. Blake was certain was a trademark dispute – which the parties already have expressly agreed will go to court. *Id.* at 347:10-16.

In effect and regardless of which, if any, of Ms. Blake's inconsistent explanations of the proposal is to be relied upon, BellSouth's language will deprive Joint Petitioners of their right to seek adjudication by a court of competent jurisdiction. Thus, BellSouth's proposal gives itself the power to deny Joint Petitioners their day in court: all BellSouth needs to do is

disagree and persist in that position. This result, obtained unilaterally by an interested party, would not be fair or equitable.

Moreover, this result is unlawful. The jurisdiction of courts in this state is set by the South Carolina Constitution, which provides that "[t]he judicial power shall be vested in a unified judicial system, which shall include a supreme court, a court of appeals, a circuit court, and such other courts of uniform jurisdiction as may be provided for by general law." SC Const. Art. V, Sec. 1. Federal court jurisdiction is similarly secured by Article III of the United States Constitution. U.S. Const. Art. III § 1. The Commission therefore does not have the authority to change or limit the jurisdiction of courts, which is precisely what BellSouth's proposed language would require it to do.

No party denies that the Commission has jurisdiction and is an expert agency in matters related to interconnection agreements. However, there may be claims more suitable for resolution in a court. For example, tort claims and associated damages may be better suited to resolution in court. Adjudication in a court of law may also, in certain circumstances, be more efficient. By requiring disputes to be brought to a state commission (such as the South Carolina Commission) or the FCC, BellSouth imposes the burden of "litigating before up to 9 different state commissions or to waiting for the FCC to decide whether it will or won't accept an enforcement role[.]" JP Direct Test. at 41:20. Because of the delay and cost inherent in dispute resolution that involves up to 9 different regulatory bodies or an often reluctant and sometimes unwilling FCC, BellSouth "often is able to force carriers into heavily discounted, non-litigated settlements." *Id*. at 43:5-6. Mr. Falvey of Xspedius described his own actual experience with litigating unpaid reciprocal compensation — $25 million worth — against BellSouth. Though "[w]e won in AAA arbitration … we

kept winning … 100 cents on the dollar plus charges past due," his company incurred significant costs in having to pursue that claim "in Georgia … in Kentucky, [and in] a AAA arbitration that spanned three states, Alabama, South Carolina, and Louisiana." Transcript of Deposition of James Falvey at 94:3-6, at 93:20-23 (Dec. 15, 2004). These costs can "bleed[] the new entrant dry." *Id*. at 94:23-24. Notably, BellSouth has refused proposals to include alternative dispute resolution in the Agreement.

BellSouth's professed worry regarding Joint Petitioners' language is that if a party were to seek dispute resolution in Court, "the most likely outcome would be for the court to defer the case to a state commission for resolution." Rebuttal Testimony of Kathy Blake at 19:7-9 (May 23, 2005) ("Blake Rebuttal Test."). Joint Petitioners do not agree that such a "deferral," by which Ms. Blake likely means a primary jurisdiction referral, would the "the most likely outcome." But in any event, primary jurisdiction referrals are no indication that a matter has been brought "prematurely" to a court, and they are not akin to a "remand." Moreover, BellSouth's hollow concern does not entitle it to curtail Joint Petitioners' rights. It is not for BellSouth to rule *a priori* that Joint Petitioners' claims cannot be heard in court. That is a matter to be determined by a court of law, were any claim to be filed. And the fact that BellSouth is not familiar with any Joint Petitioner seeking redress in court, as permitted by the current interconnection agreements, demonstrates that Joint Petitioners are not overly litigious and do not raise frivolous claims. GA Tr. at 1036:23-25 (Blake) ("I'm not familiar of any claims that may have been or disputes that may have been taken to a court[.]"); FL Tr. at 838:4-5 (Blake) (Joint Petitioners have not "exercised that right within their contract up to this point"). Moreover, it certainly does not constitute waiver of the right to go to court.

For these reasons, Joint Petitioners' position and proposed language for Issue 9 should be adopted.

Item No. 12, Issue No. G-12 *[Section 32.2]: Should the Agreement explicitly state that all existing state and federal laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the Parties?*

POSITION STATEMENT: Consistent with Georgia contract law, nothing in the Agreement should be construed to limit a Party's rights or exempt a Party from obligations under Applicable Law, as defined in the Agreement, except in such cases where the Parties have negotiated an express exemption or agreed to abide by other standards.

The Agreed-Upon Governing Law of the Agreement Is Clear that All Laws of General Application in Existence at the Time of Contracting Are Incorporated Unless Expressly Excluded or Displaced by Conflicting Requirements Negotiated by the Parties.

Under Georgia contract law, which the Parties have already agreed will govern the Agreement (GT&C, Section 22.1), all laws of general applicability that exist at the time of contracting will apply to the contract unless expressly repudiated via an explicit exception or displaced by conflicting requirements voluntarily agreed to by the parties. That is the law to which the parties already have agreed. Joint Petitioners' proposed language for Section 32.2 of the General Terms and Conditions simply incorporates this tenet of already agreed-upon governing law into the Agreement. BellSouth's contrary position simply turns a bedrock "legal principle on its head." SC Tr. at 443:17-18 (B. Russell Summary, adopted by S. Berlin).

As the parties have agreed to Georgia law as the governing body of contract law, it is important to recognize that the Supreme Court of Georgia has held that "[l]aws that exist at the time and place of the making of a contract, enter into and form a part of it … and the parties must be presumed to have contracted with reference to such laws and their effect on

the subject matter." *Magnetic Resonance Plus, Inc. v. Imaging Systems, Int'l*, 273 Ga. 525, 543 S.E.2d 32, 34-35 (2001). This holding comports with doctrine from the United States Supreme Court, which has held that "[l]aws which subsist at the time and place of the making of a contract … **enter into and form a part of it** …; this principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge." *Farmers' & Merchants' Bank of Monroe, N.C. v. Federal Res. Bank of Richmond*, 262 U.S. 649, 660 (1923) (emphasis added). And as the Court later held, "[l]aws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if fully they have been incorporated in its terms[.]" *Norfolk and Western Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 130 (1991) (holding post-merger rail company was exempt by statute from pre-existing collective bargaining agreement with labor union).

Parties are "**presumed to have contracted with reference to such laws.**" *Magnetic Resonance Plus*, 543 S.E.2d at 35. Due to this presumption, contracts are not deemed to exclude any tenet of applicable law unless done so expressly. A "contract may not be construed to contravene a rule of law." *Van Dyck v. Van Dyck*, 263 Ga. 161, 429 S.E.2d 914, 916 (1993). Parties have the right to waive or repudiate elements of applicable law, "however, these **must be expressly stated** in the contract." *Jenkins v. Morgan*, 100 Ga. App. 561, 112 S.E.2d 23, 24 (1959) (emphasis added). Stated differently, parties are "presumed to contract under existing laws, and **no intent will be implied** to the contrary unless so provided by the terms of their agreement." *Jenkins*, 100 Ga. App. at 562 (emphasis added).

Not only is this principle a tenet of law, but it also makes practical sense. Parties to a contract — particularly this Agreement, which regards highly complex duties like interconnection and unbundling — could not be expected to expressly include all elements of generally applicable law into one contract. That contract would be tens of thousands of pages long. The FCC's *First Report and Order* alone is more than 700 pages long. The basic concept that silence implies incorporation and an affirmation of willingness to abide by the law is thus a means of ensuring that contracts are of manageable size. To this day, Joint Petitioners are still ponder what legal requirements BellSouth is determined to avoid by changing the tenet of law, especially given that said tenet has governed the parties' relationship in two previous interconnection agreements. *See generally* SC Tr. at 21-24.

BellSouth's oft-heard but hollow retort — "[i]f that's the case, why do we even need an interconnection agreement?" — is frivolous. *See* GA Tr. at 1061:11 (Blake) ("why do we need an agreement?"). As an initial matter, sections 251 and 252 of the 1996 Act require interconnection agreements to be approved by state commissions. There must be something in writing for the parties to file and for the Commission to approve. As a practical matter, additional language is often needed to implement legal requirements and processes may need to be agreed upon to ensure proper conduct and operations by the parties.

Moreover, the Statute of Frauds requires that this agreement be in writing. U.C.C. § 2-201(1) (sale of goods); Rest. II Contracts § 130 (contract not to be performed within one year). Even laying the statute of frauds aside, however, this Agreement already contains concessions and express waivers of generally applicable law. For example, NuVox and Xspedius have, with BellSouth, voluntarily agreed in Attachment 3 of the Agreement to point-of-interconnection and compensation terms that deviate from the requirements set forth

in applicable law. *See, e.g.*, Att. 3, Sec.3.3.2, 3.3.3, 10.1 (NuVox); *id*. Sec. 3.3.1, 3.3.2, 10.1 (Xspedius). These concessions in fact prove Joint Petitioners' point: parties can voluntarily negotiate away rights to which they are entitled if there is a clear bargain memorialized in the plain terms of the contract. Absent plain language setting forth an agreement to abide by standards other than those set forth in applicable law, no party should be deemed to have given up their rights. To find otherwise would be unlawful, grossly unfair and contrary to the public interest.

BellSouth's proposed language for Item 12 is both contrary to prevailing law and unfair. BellSouth proposes that if Joint Petitioners contend that an element of existing telecommunications law applies to the Agreement, they must request a ruling of the Commission to that effect. If the Commission agreed that the element of law in fact applies, it would apply ***on a prospective basis only***. Until then, BellSouth would have the Commission infer an implied exception into the Agreement.

It is impossible to square BellSouth's proposal with the parties' already agreed-upon language for section 32.1 of the General Terms and Conditions, wherein the parties define "Applicable Law" as "**all applicable** federal, state, and local statutes, laws, rules, regulations, codes, effective orders, injunctions, judgments and binding decisions, awards and decrees that **relate to its obligations under this Agreement**." That settled definition does not cull "substantive Telecommunications law" out, either expressly or impliedly, but rather means any type of generally applicable law governing any aspect of this Agreement. Thus, BellSouth's new language proposal already violates settled terms.

Even as now limited by its new language, BellSouth's proposal turns the longstanding legal doctrine of contracts, summarized above, on its head. SC Tr. at 443:17-18. *See also*

Farmers' & Merchants' Bank of Monroe, 262 U.S. at 660; *Magnetic Resonance Plus*, 543 S.E.2d at 34-35. It means that federal or state telecommunications law that existed at the time of contracting would for all practical purposes be ignored by the Parties if it was not replicated in the Agreement. In that event, the non-reproduced applicable law would have no bearing on the Agreement, not only until it was invoked, but until **after *a dispute as to its applicability is resolved***. So a rule or aspect of an order of the FCC or this Commission would go unenforced and unfollowed for possibly years under BellSouth's proposal, despite the fact that the parties never negotiated an exception to or a deviation from such legal requirements. This begs the question "what [BellSouth is] trying to get out of" and "[w]hat legal requirements [is BellSouth] trying to get out of[.]" SC Tr. at 443:20-22.

BellSouth's position on this item even injures its own interests. For example, Attachment 6 of this Agreement, which relates to ordering, includes provisions (Sections 2.5.5.2 and 2.5.5.3) to govern redress for unauthorized access to Customer Service Records ("CSRs"). BellSouth seeks stringent language on that topic, in order "to protect CPNI." Deposition of Scot Ferguson at 185:16 (Dec. 7, 2004). Yet the term "CPNI" is neither defined nor mentioned in Attachment 6, nor is there a reference to the statute that regards CPNI, 47 U.S.C. § 222, or the FCC's CPNI rules. Thus, according to BellSouth's position on this Item 12, nothing in that important body of law has any place in the performance of the Agreement, and the parties are not bound by it. That cannot be the right result.

In addition, BellSouth is incorrect in arguing that it would be "in the intolerable position of not knowing exactly what its contractual obligations are[.]" Blake Direct Test. at 28:3-4. This argument is either pure hyperbole or a shocking admission of ignorance. BellSouth is required to know what its interconnection obligations are, and Ms. Blake could

think of no rules or orders that BellSouth would not follow. SC Tr. at 448:1-6; GA Tr. at 1062:14-18. Further, Joint Petitioners note that their proposal for Section 32.2 does not require that **all decisions** and orders of the FCC and this Commission apply to this Agreement. Rather, it requires that **decisions of general applicability, as well as statutes, shall apply**. Thus, for example, an existing order from an arbitration or adjudication between BellSouth and another CLEC **would not apply** to this Agreement **unless expressly incorporated**. Nor would a decision by the FCC Enforcement Bureau that involves other parties. Nor would the result in a case brought before this Commission regarding the interpretation of another CLECs' interconnection agreement. Only statutes and rules and orders resulting from general rulemakings of the FCC and this Commission that existed at the time of contracting apply. BellSouth, which seeks to comply with the law (SC Tr. at 448:1-6) — is presumed under agreed-upon as governing Georgia law to know what these legal requirements are. *See Walston & Associates, Inc. v. City of Atlanta*, 224 Ga.App. 482, 483, 480 S.E.2d 917, 918 (Ga.Ct.App. 1997) (parties to contract with the city "are presumed to know the law, OCGA § 1-3-6, which includes not only statutes like OCGA § 45-6-5 but also the provisions of municipal ordinances."); *see also Magnetic Resonance Plus*, 543 S.E.2d at 35 (parties are "presumed to have contracted with reference to such laws"). Thus, BellSouth can expect to comply with all Applicable Law, except to the extent that it has negotiated language with Joint Petitioners that expresses a clear intent to exclude particular requirements as between the parties or to displace particular requirements with conflicting ones that were freely negotiated.

BellSouth's newer concern is about federal preemption, and it is similarly misplaced. Blake Rebuttal Test. at 21:13-21. The question whether federal law preempts the law of any

state is one that gets answered in response to a request for declaration of preemption. It is not, as BellSouth suggests, a defense BellSouth may at some point raise for failure to comply with its contractual and other legal obligations. It is nonsensical for BellSouth to assert that the possibility of preemption (1) renders it unable to know what Applicable Law is, or (2) could in any way render it liable in an unnecessary or unfair way. If BellSouth intends, as it states, to comply with the law, then a heretofore-unknown instance of federal preemption should not enable it to limit that compliance as its proposed language seeks to do.

Notably, the Georgia Commission – the expert regulatory agency most familiar with the body of law that the Parties have agreed will govern interpretation of the agreement (Georgia law) – adopted the Joint Petitioners' position and language on this issue. *See Georgia Order* at 12 (excerpt attached hereto as **Attachment 5**).[13]

For all these reasons, the Agreement should state that applicable law that exists at the time of contracting will govern the Agreement unless expressly waived or repudiated.[14] Joint Petitioners' position and proposed language for Section 32.2 of the General Terms should therefore be adopted.

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[13] Decisions by the Florida, North Carolina and Tennessee commissions also rejected BellSouth's attempt to re-write Georgia contract law with a prospective compliance only proposal. *See FL Final Order* at 15-17 (excerpt of order attached hereto at **Attachment** 9); *NC Recommended Arbitration Order* at 18-21 (excerpt of order attached hereto at **Attachment 7**); and *TRA Conference Transcript* at 14:18-15:18 (excerpt of transcript attached hereto at **Attachment 10**).

[14] Changes of law that occur between the time of negotiations and finalization of the agreement should be addressed via the modification of agreement provisions of the Agreement, wherein the parties agreed to renegotiate and amend the Agreement in the event of a change of law.

Item No. 65, Issue No. 3-6 *[Section 10.8.1, 10.10. 1]: Should BellSouth be allowed to charge the CLEC a Tandem/Transit Intermediary Charge for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic?*[15]

POSITION STATEMENT: BellSouth may not impose upon Joint Petitioners a new non-cost-based, unjustified, and discriminatory Transit Intermediary Charge ("TIC") for transit traffic in addition to the TELRIC tandem switching and common transport charges the Parties already have agreed will apply to transit traffic. The TIC is a "tax" that is unlawful, unjustified and discriminatory.

Joint Petitioners Should Not Be Required to Pay the Additive "TIC" In Addition to the TELRIC Rates the Parties Already Have Voluntarily Agreed Will Continue to Apply to BellSouth's Provisioning of Transit Service.

As an initial matter, this issue is about whether BellSouth may impose a TIC over and above the TELRIC rates the parties already have agreed will apply to transit traffic. **The parties already have agreed that:** (1) BellSouth will continue to provide transit service just has it always has done, (2) TELRIC rates for tandem switching and common transport (to the extent used) will apply to this transit service, (3) that the originating party will pay for the service – same as it ever was.

Joint Petitioners must also begin by noting that BellSouth's TIC proposal is entirely vague. It began as a request for $.0015 per minute for transit traffic, GA Tr. at 1105:15-17 (Blake), in addition to the tandem switching and common transport rates already established in this Agreement, *id.* at 1104:10-16, that would purportedly cover the cost of forwarding records to third parties that identify Joint Petitioners as the originators of transited traffic. GA Tr. at 1108:2-4 (Blake). The week before the Georgia hearing it became a request for a $.0025 composite TIC rate that included tandem switching, common transport, and the new records charge. *Id*. at 1104:21 – 1105:7 (Blake). The composite rate proposal never was an

[15] Xspedius and BellSouth have reached an individual region-wide settlement on this issue. This issue therefore remains open only as to NuVox and BellSouth.

issue in this arbitration and it is still not an issue. At the hearing before this Commission, BellSouth made no mention of any rate proposal for the TIC. *See generally* SC Tr. at 353:19-354:2 (Blake Summary), 350:1-356:14. In fact, Joint Petitioners understand that BellSouth has withdrawn the composite rate proposal (which improperly sought to upend the parties' settled language applying TELRIC rates for the switching and transport functions performed in providing transit service) and has reverted back to its original proposed language now reflected in the revised Exhibit A attached hereto (page 7).[16] But, out of an abundance of caution, Joint Petitioners will discuss both the $.0015 additive TIC surcharge and the $.0025 composite TIC in this brief, both of which are inappropriate and should not be adopted for this Agreement.

1. The $.0025 Composite TIC Adopted by the Georgia Commission Is Not Justiciable in This Arbitration.

The TIC at issue in this arbitration is not comparable to the composite rate ordered as an interim rate by the Georgia Commission in Docket No. 16772-U. The $0.0025 per minute rate adopted on an interim basis by that commission – which is not at all based on TELRIC – is not at issue in this docket. Instead, the BellSouth proposed additive TIC of $0.0015 per minute is at issue here. BellSouth is not at liberty to change an arbitration issue and in essence create a brand new arbitration issue. *See generally* GA Tr. at 1102:25 – 1105:24 (Blake). In any event, Joint Petitioners note that BellSouth appears poised to challenge the Georgia TIC in some fashion: BellSouth's post-hearing brief to that Commission, filed July 8, 2005, asks that the $.0025 composite TIC be imposed on Joint Petitioners, but footnotes

[16] If this understanding is incorrect and the withdrawal applies only to states other than Georgia, it would be evident that BellSouth continues to have difficulty communicating what are settlement proposals and what are language proposals for Exhibit A, the difference between the two, and where they apply.

that "BellSouth reserves all rights relating to the Commission's authority to establish a non-TELRIC rate for the transit function." **Attachment 11** (BellSouth GA Brief at 51 n.34). Should BellSouth in fact challenge the Georgia decision, its request that Joint Petitioners be forced to adopt the composite TIC would prove disingenuous as well as unlawful. The Commission should not be fooled into accepting an interim rate from another jurisdiction that is not at issue in this arbitration – and that BellSouth, in any event, appears poised to appeal or upend in some manner.

It also must be noted that BellSouth has – prior to the Georgia Commission's adoption of the composite TIC rate – repeatedly asserted that State Commissions have no jurisdiction to include the TIC in this Agreement, Blake Direct Test. at 35:2-3, and wanted to pull the TIC out and place it in a separate agreement (a proposal which the Joint Petitioners soundly reject). Blake Deposition at 497:17-18 (Dec. 8, 2004). Yet, in Georgia, BellSouth encouraged that commission to establish a rate for transit service, and it now seeks to impose that interim rate on Joint Petitioners in mid-arbitration in every other state. BellSouth's pre-existing commitment to provide the transit function to Joint Petitioners at the same TELRIC rates that have always applied cannot be undone unilaterally.

The TIC at issue in this docket is not a composite rate and it is not the interim rate that was at issue in Georgia Docket No. 16772-U. As Ms. Blake acknowledged at the Georgia hearing, this composite TIC was never negotiated by the parties. GA Tr. at 1104:10-16. As such, the composite TIC should not be adjudicated in this proceeding. *Coserv*, 350 F.3d at 487 (a State Commission "may arbitrate only issues that were the subject of the voluntary negotiations"); *MCI*, 298 F.3d at 1274. To do so would unlawfully upend existing voluntarily negotiated language, namely that Joint Petitioners will pay a tandem switching

rate that is TELRIC-compliant and approved by this Commission.

The prevailing dispute in this arbitration over the TIC is thus substantially different than the issue for which the Georgia Commission set the interim composite rate. That new rate was never negotiated and agreed to (in this arbitration case, TELRIC rates were voluntarily negotiated and agreed to), was not raised as an arbitration issue, and therefore cannot not be forced into this Agreement.

2. The Alternative $.0015 Additive Rate Is Unjustified and Unnecessary.

BellSouth's proposed TIC of $0.0015 is neither cost-based nor just and reasonable. The parties have agreed that BellSouth will provide transit service to Joint Petitioners at the TELRIC-compliant rates for tandem switching and common transport. SC Tr. at 469:18-470:1; GA Tr. at 1104:10-16; FL Tr. at 1002:13-18 (Blake). This is settled and not subject to arbitration. What the parties did not agree on is whether BellSouth could also impose a non-cost based additive TIC of $0.0015 per minute in addition to the agreed-upon TELRIC rates. GA Tr. at 1105:15-17 (Blake); *see generally* FL Tr. at 1003:5 – 1010:15 (questioning of Ms. Blake). Joint Petitioners found this brand new charge to be unlawful, unnecessary and unsupported, and thus refused to accept the TIC. Other state commissions, including North Carolina, Kentucky and Tennessee, agreed with Joint Petitioners and have found that compensation for the transiting of traffic should be TELRIC-compliant.[17] As stated at

[17] The North Carolina, Kentucky and Tennessee commissions each have ruled in Joint Petitioners' favor on this issue. The Kentucky Commission ruled in favor of Joint Petitioners on this issue, finding that "BellSouth is required to provide transit service at a TELRIC-based rate unless an additional TIC can be justified by BellSouth." *See KY Final Order* at 18-19 (excerpt of this order attached hereto as **Attachment 8**). The North Carolina Commission concluded that "BellSouth should not be permitted to charge a TIC when providing a tandem transit function for CLPs." *See NC Recommended Arbitration Order* at 52-54; *Order Ruling on Objections* at 45-48 (excerpts of these orders attached hereto as **Attachment 7**). The Tennessee Regulatory Authority has not released a final order in the concurrent arbitration in that state between the Parties, but the Authority has rendered a vote in the arbitration proceeding favoring the Joint Petitioners on this issue.

hearing, the TIC is "an additional profit tacked on because [BellSouth is] in a unique position to be able to increase the charge for this service that nobody else is providing." SC Tr. at 452:9-12 (Falvey).

Perhaps the most compelling reason that BellSouth's should be rejected is that it is not a cost-based rate of any kind. Indeed, BellSouth provides no cost support for the proposed rate. Therefore it would be impossible on the record established in this docket for this Commission to deem the rate just and reasonable – under TELRIC or any other standard.

There are other independently valid reasons to reject the TIC. As an initial matter, it must be noted that **none** of Joint Petitioners' existing agreements include a TIC charge — this fee is new. GA Tr. at 1106:12-16 (Blake); FL Tr. at 1003:5-13 (Blake). Yet BellSouth has been transiting traffic for the Joint Petitioners since each of them (or a predecessor company) began interconnecting with BellSouth in the mid-to-late 1990s. That the TIC has never been imposed on Joint Petitioners only further demonstrates that it is unnecessary and unjustified. Until now, BellSouth has been satisfied that the agreed-upon TELRIC charges

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See TRA Conference Transcript at 25:8-27:22 (excerpt of transcript attached hereto at **Attachment 10**). Outside BellSouth's region, the Missouri Public Service Commission adopted language for the Missouri 271 Agreement ("M2A") stating that compensation for transiting "is based on TELRIC pricing." *Southwestern Bell Tel., L.P. d/b/a SBC Missouri's Petition for Compulsory Arbitration*, Case No. TO-2005-0336, Arbitration Order at 52-53 (July 11, 2005) (excerpt of order attached hereto at **Attachment 12**). In addition, the Public Utilities Commission of Texas has long required SBC, an ILEC and RBOC like BellSouth, to provide its transit services at TELRIC rates. *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Arbitration Award – Track 1 Issues, PUCT Docket No. 28821, at 23. "Consistent with prior Commission decisions in the Mega-Arbitrations, Docket No. 21982, and the predecessor T2A agreement, the Commission finds that SBC Texas shall provide transit services at TELRIC rates. The Commission notes that there has been no change in law or FCC policy to warrant a departure from prior Commission decisions on transit service." *Id*. The Texas PUC went on to say that "[g]iven SBC Texas's ubiquitous network in Texas and the absence of competitive transit providers in Texas, the Commission concludes that requiring SBC Texas to provide transit services at cost-based rates will promote interconnection of all telecommunications networks. In the absence of alternative transit providers in Texas, the Commission finds that SBC Texas's proposal to negotiate transit services separately outside the scope of an FTA § 251/252 may result in cost-prohibitive rates for transit service." (Excerpt of this order attached hereto as **Attachment 13**.) BellSouth's South Carolina network is similarly ubiquitous to that of SBC in Texas. The record in this proceeding also contains no evidence that alternative competitive transit providers are operating in South Carolina.

adequately cover BellSouth's costs. In this docket, BellSouth has provided no proof that its costs are costs imposed by NuVox or that any such costs are not covered by the TELRIC charges the parties have agreed NuVox will pay and that NuVox has been paying for this function for many years.

Moreover, it is not in dispute that BellSouth will transit traffic between Joint Petitioners and other carriers. This obligation is already in the Agreement. Agreement Att. 3, Section 10.8.1 (NVX). For this reason, BellSouth's continued resort to the argument that Joint Petitioners can avoid the TIC and "*connect directly with other carriers in order to exchange traffic*, " Blake Rebuttal Test. at 32:16-17 (emphasis added), is irrelevant and, as a practical and economic matter, BellSouth's contention is simply wrong. GA Tr. at 413:5-9 (Mertz). Joint Petitioners explained in their Rebuttal Testimony that such direct interconnection is infeasible because traffic volumes do not justify the connections and because "[d]ifferent CLECs have different network configurations and needs." JP Rebuttal Test. at 60:13-14. Virtually all carriers have already established connections with BellSouth, rendering BellSouth – the still dominant incumbent – the only party in a position to efficiently transit traffic between them.

Consistent with section 251 of the Act, BellSouth has already agreed to transit traffic. If anything, BellSouth's repeated reference to (typically uneconomic) direct interconnection only further demonstrates that it is using the TIC as a means to extract monopoly rents, or perhaps to punish CLECs, for electing to efficiently passing traffic over BellSouth's legacy tandem facilities. Indeed, the North Carolina Commission has held that an ILEC is obligated to transit traffic "as a matter of law." **Attachment 14** (*Verizon Petition for Declaratory Ruling*, Docket P-19, Sub 454, Order Denying Petition at 5-6).

In addition, there is no alternative to BellSouth transiting in South Carolina. *See* SC Tr. at 469:1-4. The only non-ILEC transiting provider of which BellSouth (and NuVox) is aware, Neutral Tandem, does not provide service in this state, JP SC Exhibit 4, as BellSouth witness Blake was forced to acknowledge. SC Tr. at 468:19-25. BellSouth's insistence that Joint Petitioners can simply avoid the usurious TIC by using alternate methods of transiting is thus setting up an unfair Hobson's Choice: Joint Petitioners must pay the fee or let their customers' calls be dropped.

Joint Petitioners have long disputed the TIC as being an unsubstantiated and unnecessary additive charge. JP Direct Test. at 71:5-72:20; SC Tr. at 452:8-12. As Joint Petitioners' witness stated at the Georgia hearing, "there's this additional charge that BellSouth wants [us] to pay above that and we've said to them what exactly are we paying for, we've never gotten a straight answer." GA Tr. at 469:18-21. BellSouth's written testimony asserts that the TIC charge covers the costs of "**sending records to the CLECs** identifying the originating carrier." Blake Direct Test. at 35:16-17. In other words, BellSouth would send records to NuVox informing NuVox of the traffic NuVox had originated. Having realized that assertion makes no sense,[18] Ms. Blake changed this testimony for other hearings. BellSouth's new position is that it must send records to the terminating carrier identifying the **originating** carrier, in order that **terminating** carrier knows who sent it. *See* GA Tr. at 1108:2-4 (Blake). But, it is the carrier that **originates** a transit call that would pay BellSouth's TIC. *See* GA Tr. at 1107:7-10. So, BellSouth seeks to charge Joint Petitioners for records BellSouth sends to third parties. If this weak

[18] At hearing in North Carolina, Ms. Blake acknowledged that "I think you know who you are." **Attachment 15** (NC Tr. v. 6 at 343:11).

justification for the TIC is true at all, it is not only patently unfair, it makes no sense. Joint Petitioners do not need the records (because they have the capabilities to determine which calls are coming into and out of their switches), they have not asked for the records, and if other carriers want to purchase them, then those carriers can go directly to BellSouth and purchase the records. SC Tr. at 452:13-19. Joint Petitioners should not pay for records that another party requests or receives. Moreover, Joint Petitioners' own switches and signaling provides terminating carriers with information to identify them as the originating carrier. As such, Joint Petitioners do not need BellSouth to send these records, either to Joint Petitioners or to third parties.

The Commission therefore should hold that Joint Petitioners must pay only the agreed-upon tandem switching and common transport rate in connection with transited traffic, as BellSouth has failed in this arbitration to provide any justification for an additive TIC rate.

Item No. 86, Issue No. 6-3 *[Sections 2.5.6.2, 2.5.6.3] (A) This issue has been resolved. (B) How should disputes over alleged unauthorized access to CSR information be handled under the Agreement?*

POSITION STATEMENT: Disputes over CSR access should be handled pursuant to the Dispute Resolution provisions set forth in the General Terms of the Agreement. BellSouth's ambiguous language that reserves some right to suspend access to ordering systems and to terminate all services, is coercive and threatens to harm competitors and consumers.

Disputes Over Unauthorized Access to CSR Information Should be Subject to the Dispute Resolution Provisions of the Agreement.

Disputes over unauthorized access to CSR information should be handled in the same manner as other disputes arising under the Agreement. The party alleging non-compliance should notify the other party of the issue. If the parties are unable to resolve the dispute

themselves, they should resort to the dispute resolution provision in the General Terms and Conditions of the Agreement. BellSouth's proposed "self-help" remedies are inappropriate, dangerous and coercive. JP Direct Test. at 76:10-14.

BellSouth proposes a menu of debilitating and extremely disruptive sanctions for any allegation by BellSouth of unauthorized access to CSR information. Under its proposal, BellSouth could refuse to accept new orders and it could also suspend any pending orders, and access to ordering and provisioning systems, Ferguson Direct Testimony at 4:8-16 (May 11, 2005), thus closing off Petitioners' ability to serve the needs of existing customers, as well as potential new ones. Ultimately, BellSouth may discontinue the provisioning of existing services no matter how unrelated to the unproven allegations of unauthorized access to CSRs. BellSouth's proposal affords it the discretion to select any of these remedies regardless of whether allegations pertained to an isolated problem or one that was systemic. GA Tr. at 690:6, 14 (Ferguson) (stating "[y]ou've got to have some firm language" that will apply on "just an individual case basis").

Critically, under BellSouth's recent proposal, it has the sole discretion to impose these draconian sanctions, which threaten catastrophic impacts on both CLECs and the South Carolina businesses (predominantly small businesses) they serve. At the hearing in Georgia, Mr. Ferguson acknowledged that suspension or termination "definitely" has a severely disruptive impact on Joint Petitioners' business. GA Tr. at 687:3-7. BellSouth has offered no rationale for seeking the right to impose such an extreme and one-sided remedy.[19] Nor

[19] Mr. Ferguson did, however, make one very telling remark in Georgia. He stated that a customer could "choose to go away from the account set up that they had with the CLEC" in order to avoid service disruption. GA Tr. at 687:20-22. This remark suggests that BellSouth's intent in Item 86 is not to safeguard CPNI but rather to use anticompetitive and dangerous methods to drive customers away from CLECs and back to BellSouth.

has BellSouth alleged or shown that any Joint Petitioner has ever misused CSR information in the past. If such remedies are ever appropriate, it should be up to the Commission to decide to impose them – not BellSouth.

BellSouth's proposed language **does not preclude** BellSouth from terminating services if a Petitioner files a dispute with the Commission. Rather, BellSouth's language simply states that, where an accused party disputes allegations of CSR misuse, "the alleging Party shall proceed" according to the Dispute Resolution language in the General Terms and Conditions. Exhibit A at 15. In fact, BellSouth **refuses** to accept Joint Petitioners' suggested language that "the alleging Party shall not invoke any remedy specified in this paragraph" pending a dispute. Exhibit A at 14. This refusal demonstrates that BellSouth intends to engage in coercive and anticompetitive conduct unless the Commission takes steps now to ensure that it cannot.

Petitioners must also make clear that this issue is not simply about producing LOAs, as BellSouth may suggest. BellSouth's language does not state that producing an LOA (Letter of Authorization) ensures service continuity. Rather, BellSouth's language states that suspension and termination will occur if the alleged unlawful CSR access "is not corrected or ceased." Exhibit A at 15. BellSouth unilaterally decides if the use has ceased or been corrected. GA Tr. at 690:4-22 (Ferguson).

The gravity and overbreadth of BellSouth's language became clear at the Georgia hearing, when BellSouth witness Scot Ferguson could not answer the arbitration panel's questions as to when and why service termination would be imposed. GA Tr. at 688:16-22 ("Well, how severe does the violation have to be?") (Commissioner Baker); *id*. at 689:15 – 690:3. Rather, he could only state that "[y]ou've got to have some firm language" and

whether a Petitioner will get off is "just an individual case basis." *Id*. at 690:6, 22. Commissioner Baker immediately saw the danger here, asking "[w]ell, who makes the final call? … I mean, effectively you're going to put companies out of business if you ever did that." GA Tr. at 703:16-22.

As a result of this questioning by the Georgia Commission, BellSouth revised its proposed language for Item 86(b), as the potential for abuse and grave harm to Joint Petitioners and their customers had become starkly evident. *See* Exhibit A at 15. While this language appears to accept the precept that disputes should be decided by a neutral decision-maker, such as the Commission, it inexplicably retains the menu of debilitating pull-the-plug remedies and impossibly short response windows (*e.g*., BellSouth "may discontinue the provisioning of existing services if such use is not corrected or ceased by the tenth (10th) calendar day"). At the next hearing, which was before the Florida Public Service Commission, Mr. Ferguson was unable to explain why it was that BellSouth felt compelled to leave in its proposed "pull-the-plug" language that could be used by BellSouth to turn Joint Petitioners' networks dark and cause massive service outages (likely without notice) to their entire base of customers within just 10 days. FL Tr. at 784:5-13 (acknowledging that Petitioners' counsel was "absolutely right" that BellSouth's language retains a right to terminate all services). Mr. Ferguson's assurances that BellSouth will use its power to impose the "ultimate remedy" judiciously provides no comfort, as neither he nor his friendly spin on what BellSouth would do are within the four corners of the contract.

Moreover, Mr. Ferguson was unable in Florida to explain away the apparent conflict between BellSouth's proposed language and the Dispute Resolution provisions in the General Terms of the Agreement. FL Tr. at 778:21 - 779:5. Again, Mr. Ferguson's

assurances that the general provisions governing dispute resolution which require continuing performance during a dispute would trump the more specific provisions that would seemingly allow BellSouth to terminate services provides no comfort. FL Tr. at 779:3-5. Indeed, Mr. Ferguson's assurances are at odds with the way Georgia contract law would apply to the interpretation of the agreement (if there is a conflict between general and specific provisions, the specific provisions trump). *E.g., Tower Projects, LLC v. Marquis Tower, Inc.*, 598 S.E.2d 883, 885 (Ga. Ct. App. 2004) ("When a provision specifically addresses the issue in question, it prevails over any **conflicting** general language."). Thus, nothing would stop BellSouth's lawyers from telling Joint Petitioners, or even the Commission, a few months or years down the road that Mr. Ferguson was wrong (and that he was unqualified to give assurances that hinged upon legal questions of contract interpretation).

When the business of the Joint Petitioners and the service of their South Carolina customers are on the line, this Commission simply cannot delegate such "enforcement" power to BellSouth. The harms caused by misuse of that power would be massive, widespread – and from the standpoint of Joint Petitioners, irreparable. If ever such remedies are appropriate the Commission can decide.

Notably, nearly all of the Commissions that have decided this issue to date have rejected BellSouth's position and language and have ruled in favor of the Joint Petitioners.[20]

[20] The Kentucky Commission determined that "BellSouth must seek enforcement of the Joint Petitioners' obligations by filing a complaint with the Commission rather than by discontinuance of access to the CSR information and suspension of service." *See KY Final Order* at 19 (excerpt of this order attached hereto as **Attachment 8**). The Kentucky Commission further noted that, "due to the potential competitive harm which could be realized by discontinuance of access to this CSR information and suspension of service, BellSouth should not be permitted to discontinue without first filing a complaint with the Commission." *Id.* at 20. Upon reconsideration, the North Carolina Commission affirmed its initial decision in the *NC Recommended*

For these reasons, the Commission should adopt Joint Petitioners' position and proposed language for Issue 86(b),[21] as it affords no less protection to CPNI and much more protection against potentially fatal abuse by BellSouth.

Item No. 97, Issue No. 7-3 *[Section 1.4]: When should payment of charges for service be due?*

POSITION STATEMENT: Payment of charges for services rendered should be due thirty calendar days from receipt or website posting of a complete and fully readable bill or within thirty calendar days from receipt or website posting of a corrected or retransmitted bill, in those cases where correction or retransmission is necessary.

Payment for Charges Should be Due 30 Calendar Days from Receipt or Website Posting.

Payment of charges for services rendered under the Agreement should be due 30 calendar days from receipt or website posting of a complete and fully readable bill. JP Direct Test. at 81:5-6. Joint Petitioners receive an enormous number of bills from BellSouth monthly which are voluminous and complex. JP Direct Test. at 82:1; JP GA Exhibit 2 (approximately 12 inch high copy of voluminous bill from BellSouth to NuVox); SC Tr. at

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Arbitration Order to adopt Joint Petitioners' proposed language; however, the North Carolina Commission found it appropriate to alter the language to include specific periods for action by an accused party. *NC Final Order* at 53-54 (excerpt of this order is attached hereto as **Attachment 16**). The Tennessee Regulatory Authority has not released a final order in the concurrent arbitration in that state between the Parties, but the Authority has rendered a vote in the arbitration proceeding favoring the Joint Petitioners on this issue finding that the parties must turn to the dispute resolution processes of the Agreement and that a party has 30 days to respond to allegations. *See TRA Conference Transcript* at 28:10-29:23 (excerpt of transcript attached hereto at **Attachment 10**). The Georgia Commission adopted Joint Petitioners' proposed language related to emailing notice to recipients designated in the General Terms and Conditions. The Georgia Commission also adopted Joint Petitioners' proposed language related to not invoking any remedy specified in this paragraph if there is a dispute over the allegation, and instead, proceeding to the dispute resolution provisions in the Agreement. *See Georgia Order* at 27-29 (**Attachment 5**).

[21] Joint Petitioners responded to BellSouth's new language proposal by "redlining" that proposal to ensure that the representations and assurances made by Mr. Ferguson during cross examination at the Florida hearing (that the Commission and not BellSouth would resolve disputes and determine whether imposition of any of the remedies lists is appropriate) were incorporated into the four corners of the agreement. Joint Petitioners offered this redlined language to BellSouth long ago and have even adopted it as their own new language proposal for this issue. Exhibit A at 8-9. Alarmingly, BellSouth has refused to accept Joint Petitioners' revised language. Regrettably, this refusal casts considerable doubt on the credibility and reliability of Mr. Ferguson's testimony.

498:11 (Falvey) (Xspedius receives over 500 bills a month; NuVox has testified it receives over 1100 bills a month). These bills are often incomplete and sometimes incomprehensible. JP Direct Test. at 81:20-21. There is generally a long gap between the bill issue date and the date the BellSouth bill is actually posted or received by Joint Petitioners. *Id*. at 82:17-23. BellSouth takes from **2 to 22 days** to deliver its electronic bills to Xspedius. *Id.* at 82:22. Xspedius conducted a study of its BellSouth billing and found that on average the bill was received more than 6 days after the bill issue date posted on the BellSouth bill. JP Direct Test. at 82:17-20. NuVox has testified that it has approximately three weeks – 19 to 22 days – to review bills due to the delay in receiving them. JP Direct Test. at 82:8-11. Because of the volume and complexity of the BellSouth bills, it would in the ordinary course take more than three weeks to properly review and process them for payment. JP Direct Test. at 82:10-12.

BellSouth's testimony corroborates these results, as BellSouth explains that its proposed process starts by designating a bill date on day one and then it takes various steps before sending out electronic and paper bills generally 4 or more days later (stating that CLECs have a maximum of 25 days to pay but that may be "a shorter interval depending on actual mail delivery schedules"). Blake Rebuttal Test. at 41:17-18. At the Georgia hearing, Ms. Blake first stated that "the average delivery time is three to four days," GA Tr. at 1122:16, but then admitted that "generally" **CLECs only have 22 days to review their bill**. *Id*. at 1125:19. *See also* **Attachment 17** (excerpt of Morillo written testimony for Georgia Commission). So, it seems undisputed that the 22 day figure is – on average – about right. This abbreviated payment window places an onerous, and unnecessary, burden on Joint Petitioners to ensure timely payment.

The alternative to Joint Petitioners' paying on time is to have valuable capital tied up in security deposits and to pay substantial late payment penalties. JP Direct Test. at 83:16-18. This capital would be better put to use in deploying facilities and in ensuring high quality and innovative service offerings. Thus, BellSouth's payment requirements abuse "its monopoly legacy and bargaining position to force CLECs to either remit payment faster than almost any other business or in the alternative face substantial late payment penalties and increased security deposits." *Id*. at 83:22-84:1.

Notably, BellSouth does not itself abide by the payment due date that it seeks to impose on Joint Petitioners. BellSouth has stated that it either pays or disputes bills within 30 days ***of receiving them***, but as witness Falvey explained at hearing, BellSouth itself has a history of failing to make timely payments – at one time, BellSouth owed Xspedius's predecessor "over $2 million in reciprocal compensation." SC Tr. at 503:7-23. BellSouth's own testimony in several other states, for example North Carolina, shows that BellSouth measures timely bill payment based on date of ***receipt*** rather than bill issue date. Morillo Direct Testimony at 18:20-25 (North Carolina) (**Attachment 19**).[22] Ms. Blake's attempt at the Georgia and Florida hearings to diminish this clear disparity was nonsensical and unavailing.[23] However, in this arbitration, BellSouth is asking the Commission to apply a higher standard to Joint Petitioners. That is a patent violation of parity — BellSouth is not

[22] BellSouth's own testimony demonstrated that for a period it only managed to pay KMC's invoices within 30 days of its receipt of such invoices 38% of the time. GA Tr. at 1136:19 – 1137:2 (Blake). Thus, although Joint Petitioners are only asking for payment to be due 30 days from receipt of an invoice, it appears that **BellSouth** actually needs even more time and that a request for 45 day payment terms would be quite reasonable in this context.

[23] Ms. Blake stated in Georgia that this metric "was just an internal way we calculated that particular percentage." GA Tr. at 1136:10-11. In Florida she stated that it "was just the basis of a calculation here … BellSouth is not supporting a payment due date of 30 days from receipt." FL Tr. at 1041:15-17. So BellSouth advocates a 30-days-from-invoice requirement for Joint Petitioners, but does not use it when measuring its own payment timeliness.

treating itself the way it seeks to treat Joint Petitioners. *See* 47 U.S.C. § 251(c)(3); 47 C.F.R. §§ 51.311(a) ("The quality of an unbundled network element, as well as the quality of the access to the unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be the same for all telecommunications carriers requesting access to that network element"), 51.313(a) ("The terms and conditions pursuant to which an incumbent LEC provides access to unbundled network elements shall be offered equally to all requesting telecommunications carriers).

Requiring payment in less than 30 days is unacceptable in most commercial settings. JP Direct Test. at 83:14-18. The Kentucky Commission found that "interconnection agreements between BellSouth and the Joint Petitioners should include language stating that payments for charges for service rendered are due 30 calendar days after BellSouth's issuance of the bills." *See KY Final Order* at 21-22 (excerpt of this order is attached hereto as **Attachment 8**). The Kentucky Commission went on to say, "[i]ssuance should be determined by either the bill's postmark or the web site posting date." *Id.* at 22. The North Carolina Commission concluded that the payment due date should be 26 days from the date of receipt of the bill. *See NC Final Order* at 62 (affirming its initial decision in the *NC Recommended Arbitration Order*) (excerpt of this order is attached hereto as **Attachment 16**). The Georgia Commission adopted the same language that was approved in Docket No. 16583-U, which provides that bills are due 30 days after the date the bill is sent out by BellSouth. *See Georgia Order* at 29-31 (excerpt of this order is attached hereto as **Attachment 5**).

Arbitrator Robert L. Lehr of the Kansas Corporation Commission agrees, who observed in a recent multi-CLEC arbitration that "[t]he problem for the CLECs is that they

never have 30 days from the bill date to audit their bills." *In the Matter of the Petition of the CLEC Coalition for Arbitration against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas under Section 252(b) of the Telecommunications Act of 1996*, Docket No. 05-BTKT-365-ARB), Arbitrator's Determination of Issues ¶ 33 (Kan. Corp. Comm'n Feb. 16, 2005) ("*Kansas Decision*") (**Attachment 18**). He found that "CLECs require more time to audit their bills," and thus held that "CLECs shall have 45 days after the bill date by which time payment must be received by SWBT." *Id*.

In addition, the Georgia Commission has ordered BellSouth to allow ITC^DeltaCom to pay invoices 30 days "after the date the bill is sent out by BellSouth;" an Alabama Commission panel has ordered payment within 30 days of receipt of the invoice. **Attachment 20** (*Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. 16583-U, Order at 15 (Ga. P.S.C. Nov. 20, 2003); *Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. 28841, Arbitration Panel Recommendations at 53-56 (Ala. P.S.C. Apr. 27, 2004)).

The Commission should order that the Agreement provide for payment of invoices within 30 days of receipt or website posting of a complete and fully readable bill. Accordingly, the Commission should find that Joint Petitioners' position and proposed language for Issue 97 is just, reasonable and should be adopted.

Item No. 100, Issue No. 7-6 *[Section 1.7.2]: Should CLEC be required to calculate and pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination?*

POSITION STATEMENT: Joint Petitioners should not be required to calculate and pay past due amounts in addition to those specified in dollars and cents on BellSouth's notice of suspension/termination for nonpayment in order to avoid suspension or termination. Otherwise, Joint Petitioners will risk suspension or termination due to possible calculation and timing errors.

BellSouth Should Not Be Permitted to Suspend Access or Terminate a Joint Petitioner's Service for Non-Payment for Services Provided Unless It Makes Clear the Exact Amount That Must Be Remitted to Avoid Termination.

BellSouth seeks in this Agreement the right to terminate Joint Petitioners' service if any of their accounts become past due. Exhibit A at 11. Notably, it refuses to accept Joint Petitioners' proposed language that would make the right reciprocal. (Joint Petitioners concede however, that they cannot imagine a scenario where it would make sense to cut off services to BellSouth and as a result cut their customers off from the overwhelmingly dominant share of customers served by BellSouth. The point is, however, that BellSouth finds the prospect of facing such drastic measures itself to be unacceptable.) It is also notable that this is one of only a few instances where Joint Petitioners have agreed to incorporate a limited and highly qualified right for BellSouth to impose such drastic remedies. That is because Joint Petitioners are committed to paying for the services they order and receive from BellSouth. With such remedies available – and knowing that they not only threaten the very existence of each Joint Petitioner and that they would, if imposed disrupt services to South Carolina businesses and consumers served by the Joint Petitioners – it is imperative that all possible guesswork is eliminated from the steps needed to avoid imposition of potentially business destroying remedies.

Service discontinuance is the most serious possible course of action for any utility. It is no hyperbole to say that service discontinuance threatens lives. For these reasons, service discontinuance is governed by both federal and state statutes. Section 214 of the Communications Act states that "[n]o carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the [FCC] a certificate[.]" 47 U.S.C. § 214(a). As the FCC has held, "Section 214(a) has an essential role in the Commission's efforts to protect consumers. Unless the Commission has the ability to determine whether a discontinuance of service is in the public interest, it cannot protect customers from having essential services cut off without adequate warning, or ensure that these customers have other viable alternatives." *In re Arbros Communications Inc*., Notice of Apparent Liability for Forfeiture, 18 FCC Rcd. 3251, 3254 ¶ 7 (2003). This state has an analogous service discontinuance rule. South Carolina Code of Regulations 103-633 ("Procedures for Termination of Service") states that "service may be terminated for non-payment of a bill, provided that the telephone utility has made a reasonable attempt to effect collection and has given the customer written notice that he has five days in which to make settlement on his account or have his service disconnected." Thus, while BellSouth may have the right to terminate service to end users for nonpayment, that permission is subject to restrictions that BellSouth's language would not include.

BellSouth's proposal builds in guesswork and only adds to its ability to use the proposed provisions in a coercive and inappropriate manner. According to BellSouth's proposed language for Section 1.7.2 of Attachment 7, once any account (and due to BellSouth's unusual and arcane billing practices, Joint Petitioners each have several hundred separate accounts with BellSouth) goes unpaid for 31 days, a Joint Petitioner will receive an

automatically generated Notice and will have 30 days to pay not only the amount due on that account, but all amounts that may become past due **on that and all other accounts**, in order to avoid service termination. Exhibit A at 11. The Joint Petitioner would have only 15 days (or less) to process, dispute, calculate, and pay all of these amounts before BellSouth will start rejecting all new service orders, and only 30 days to avoid termination of all services (no matter how related to the services for which payment was not made). *Id*. Moreover, there should be no doubt that BellSouth wholly intends to invoke this right to pull the plug.

The catch in all this is that the Notice will not state the full amount that will become due on all accounts, but only the amount due under the initial past due account. As such, BellSouth is "putting the onus on the CLEC to recalculate his bill," which Commissioner Burgess of the Georgia Commission found "a little strange." GA Tr. at 532:11, 21.[24] And as Joint Petitioners noted at hearing, it is "a very difficult process to pin down to the penny exactly the amounts that would be due on unrelated invoices that may become past due during that time period." SC Tr. at 529:21-24 (B. Russell, adopted by Berlin). Critically, Joint Petitioners also object to BellSouth's proposal to effectively collapse and consolidate subsequent past due notices into a single notice (even though its systems will continue to spit out notices subsequent to the initial one). SC Tr. at 528:5-12 ("you also have to pay any of those other amounts that aren't explained in the bill or brought to your attention"). This accelerated payment provision denies proper notice on subsequent amounts due and creates enormous potential for confusion and error. JP Test. at 87:11-16 (explaining that customers' service is jeopardized "if Joint Petitioners fail to properly track, time, trace and predict

[24] Commissioner Burgess went on to observe that "I don't know of any on the retail side where the provider puts the onus on the customer to calculate their own bill and send a payment in." GA Tr. at 533:15-16.

BellSouth's behavior … in a manner that allows us to arrive at a 'magic number'"). The stakes are too high for short notice, confusion or error. As is evident from BellSouth's refusal to accept Joint Petitioners' proposed language, BellSouth refuses to include in its notice the amount that needs to be paid in order to avoid total service shut down. JP Rebuttal Test. at 70:14-17 (noting that BellSouth will offer only "manual help" upon Petitioners' request).

BellSouth also builds into the "game" guesswork as to whether disputes will be properly and timely recognized, and as to when BellSouth will recognize receipt of payment. JP Direct Test. at 86:18-20 ("BellSouth could simply delay posting of payment"); SC Tr. at 530:23-25 ("we have to be responsible … to the penny and guess how BellSouth is posting payment and recognizing disputes"). BellSouth then compounds and complicates all of this by attempting to have a single notice connected to a single "account" apply to potentially hundreds of other "accounts." *Id*. at 528:5-12 ("you also have to pay any of those other amounts that aren't explained in the bill or brought to your attention"). It is potentially as disorienting and as dangerous as a cyclone. BellSouth's proposal creates an opportunity for error and gamesmanship that is unreasonable, unacceptable and contrary to the public interest. JP Test. at 71:10-17 (noting that BellSouth's notice system "is simply too risky to be acceptable" and "could destroy [Petitioners'] businesses and the businesses of the customers we serve").

BellSouth attempts to minimize this significant termination risk by claiming there is an ongoing dialogue between the parties and therefore no guesswork is required. Yet the record evidence shows that this communication has been exaggerated. First, NuVox explained that it received notice of termination – termination of all services that BellSouth

provides to NuVox – due to $65 shortfall in a NuVox payment ("that's .0002% of what we pay every month"). SC Tr. at 528: 13-23; (B. Russell, adopted by Berlin); *see also id.* 531:13-532:12; **Attachment 21** (KY Hearing Exhibit JP 1-B). Sending such a letter over a mere $65 payment discrepancy does not suggest an ongoing dialogue.

Secondly, that $65 notice was addressed to NewSouth Communications, an entity that NuVox acquired in 2004 and that did not exist in May 2005 when the notice was sent. It thus seems that this threat to shut down service to NuVox completely was auto-generated, and the billing system had not even been updated to reflect the correct CLEC (or that the amount was not past due). **Attachment 3** (KY Tr. at 79:21 – 80:10). These facts clearly refute Ms. Blake's assertion that the question of service termination is handled cautiously and with individual attention.

Based on statutory service disconnection requirements, the underlying public policy considerations, and the potential that application of the remedies proposed in Item 100 could cause discontinuance of services to numerous small and medium-sized business customers without adequate notice, the Commission should strike the proposal or at the very least the remedies contained therein. *See* 47 U.S.C. § 252(e)(2)(A)(ii). In such instance, disputes would be resolved pursuant to the dispute resolution provisions of the Agreement, which would bring the matter before the Commission, the FCC or a Court of competent jurisdiction (unless, of course, the Commission accepts BellSouth's invitation to strip courts of their jurisdiction under Issue 9).

As Joint Petitioners have explained, BellSouth's proposed language for Section 1.7.2 would create "nothing less than a 'fire drill.'" JP Direct Test. at 85:9. It would require Joint Petitioners to calculate and pay "the precise amount that BellSouth calculated" as being past

due or that may become past due in the future. *Id*. at 86:11-12. In addition, Petitioners "would have to calculate any late payment charges, any interest charges" that accrue during the relevant period. SC Tr. at 529:18-20 (B. Russell, adopted by S. Berlin). Joint Petitioners must engage in this high-stakes exercise despite the fact that "only BellSouth can know (and control) the answer to that calculation." *Id*. at 86:14. A "shell game" would ensue that could easily be rigged or abused by BellSouth. JP Direct Test. at 83:10-11. Even leaving that possibility aside, the calculation that the Joint Petitioner would be forced to perform carries a substantial risk of calculation errors that, under BellSouth's language, could result in termination of service to a Joint Petitioner and the Joint Petitioner's customers. As Mr. Russell observed during the hearing before the Kentucky Commission, under BellSouth's proposed language, "you may make payment, but, because of some calculation error, … you could still get terminated." **Attachment 3** (KY Tr. at 47:14-17). That possibility arises because there is a "dispute group" as well as a "payment group" at BellSouth, and they "have to jibe up, if you will. They have to get all their numbers correct." SC Tr. at 530:10-12. If their numbers are not correct, the CLEC gets terminated. It's a "Damocles sword" hanging over Joint Petitioners' heads. *Id*. at 51:11.

BellSouth recently proposed new language for Section 1.7.2 that evidences a partial and unsatisfactory attempt to address Joint Petitioners' concerns. This language includes a new sentence at the end of the provision, which provides that "Upon request, **BellSouth will provide information** to [Joint Petitioner] **of the Additional Amounts Owed** that must be paid prior to the time periods set forth in the written notice to avoid suspension of access to ordering systems or discontinuance of the provision of existing services as set forth in the initial written notice." Exhibit A at 11. This language does not solve the problems of

inadequate notice and the elevated potential for error and confusion created by BellSouth's attempt to have notice on a single account suffice for the notice that would be required on all others (potentially hundreds of others).

Notwithstanding that fatal flaw, BellSouth insinuates that no guesswork is involved with its agreement to send "aging reports" upon request. *See*, *e.g.*, SC Tr. at 534:10-12 (Culpepper). Notably, BellSouth does not typically provide such information with its notices, and BellSouth makes no commitment as to how timely and accurate it will be in response to a request for the information. Thus, BellSouth's new language does not eliminate the potential for errors and gamesmanship. Indeed, the record shows that these reports include the disclaimer "**Not an Official BellSouth Document**," SC Tr. at 537:11-19 (B. Russell, adopted by Berlin), thus rendering the information therein completely unreliable (if BellSouth won't deem it reliable, how can Joint Petitioners rely on it and avoid termination?). It also does nothing to address Joint Petitioners' concern regarding inappropriate acceleration of payment and decrease in notice periods related to all accounts other than the one tied to the initial notice (any amounts that become due after the first suspension notice must be paid in an increasingly small timeframe – the 15/30 day clock is ticking under BellSouth's proposal for **all** accounts and not only the one for which the full and required 15/30 day notice was given). Accordingly, the Commission should reject BellSouth's language, even as amended.

Acceleration and calculation of payments and disputes are not the only problems. As Mr. Russell explained, if a payment or dispute is not "posted," or officially registered in the BellSouth system, then a Joint Petitioner is deemed not to have paid or disputed. NuVox has had problems with BellSouth's late posting payments and disputes in the past – several of its

payments had not been posted, inciting BellSouth to demand a shocking $6 million deposit on grounds of credit risk (BellSouth later retracted that demand). SC Tr. at 538:1-14. *See also* GA Tr. at 531:17-19 (Russell); FL Tr. at 260:15-19 (Russell). BellSouth's new proposal, like its previous offers, does not account in any way for uncontrollable and unpredictable BellSouth-controlled variable of posting payments and disputes.

The Commission like the majority of Commissions that have addressed this issue to date, should therefore adopt Joint Petitioners' position and language for Item 100.[25] It states quite simply that either party may send a notice of nonpayment to the other, and may require such amounts "as indicated on the notice in dollars and cents" to be paid within 15 days to avoid suspension of ordering access, and within 30 to avoid service termination. Exhibit A at 11. This language eliminates the potential for gamesmanship and grave harm to competitors and South Carolina customers.

Item No. 101, Issue No. 7-7 *[Section 1.8.3]: How many months of billing should be used to determine the maximum amount of the deposit?*

POSITION STATEMENT: The maximum deposit should not exceed one month's billing for services billed in advance and two months' billing for services billed in arrears (as in the

[25] The North Carolina Commission adopted Joint Petitioners' language for this issue. *See NC Final Order* at 66 (affirming its initial decision in the *NC Recommended Arbitration Order* to adopt Joint Petitioners' proposed language) (excerpt of this order attached hereto as **Attachment 16**). The Kentucky Commission ruled in favor of Joint Petitioners, agreeing that it is inappropriate that Joint Petitioners' service would be suspended when, in fact, Joint Petitioners have paid the exact amount identified in BellSouth's written notice. The Kentucky Commission found that BellSouth should calculate the exact amount due and the date by which the amount must be received in order to avoid suspension of service, and if additional past due amounts are accrued, then BellSouth should send a written notice to Joint Petitioners specifying such additional amounts. *See KY Final Order* at 22 (excerpt of this order is attached hereto as **Attachment 8**). The Georgia Commission rejected BellSouth's proposal, noting that "Joint Petitioners raised legitimate concerns that there would be ambiguity and lack of notice about the precise amount owed." *See Georgia Order* at 33 (excerpt of this order is attached hereto as **Attachment 5**). The Tennessee Regulatory Authority has not released a final order in the concurrent arbitration in that state between the Parties, but the Authority has rendered a vote in the arbitration proceeding favoring the Joint Petitioners on this issue. *See TRA Conference Transcript* at 34:5-35:16 (excerpt of transcript attached hereto at **Attachment 10**).

new DeltaCom/BST Agreement). Alternatively, the maximum deposit should not exceed two months' estimated billing for new CLECs or one and one-half month's actual billing for existing CLECs.

BellSouth Is Not Entitled to Request a Deposit for Greater Than One Month for Services Billed in Advance and Two Months for Services Billed in Arrears.

BellSouth seeks the right to collect a deposit from each Joint Petitioner equal to two months' worth of billing. Exhibit A at 12. But the Joint Petitioners' well-established business relationships with BellSouth warrant that a less onerous deposit policy be implemented. Joint Petitioners have conducted business with BellSouth now for many years, and BellSouth has not attempted to assert, either in written testimony or at hearing, that they have a payment history that somehow aggravates BellSouth's risk. *See* Blake Rebuttal Test. at 47:16-48:4. In fact, BellSouth acknowledges that NuVox has a "stellar" payment record. GA Tr. at 1134:9-12 (Blake).

Joint Petitioners have already agreed with BellSouth on the individual criteria by which a deposit request may be triggered, including their payment history, liquidity, and bond rating. Agreement, Att. 7, Section 1.8.5.[26] But the fact that the parties agree on the deposit criteria does not moot the issue of maximum deposit, because the application of those criteria may create disputes as to the appropriate amount up to the maximum (triggering the criteria does not automatically trigger the maximum deposit amount – **there is no set formula**). As Mr. Russell stated in Georgia, BellSouth may erroneously apply these criteria, resulting in what is essentially a request for a "wrongful deposit," thus leading to a legitimate dispute. GA Tr. at 542:19-21.

[26] Joint Petitioners note that a 2-month maximum deposit provision ordinarily is attached to provisions requiring full refund of the deposit upon establishment of a good payment history. Since Joint Petitioners already have compromised by agreeing to BellSouth's demands for the inclusion of other factors, it is evident that comparison to "BellSouth standard" two-month deposit provisions is inapposite.

BellSouth's claim of an industry standard is of dubious origin. BellSouth does not have a two-month deposit from either of the Joint Petitioners. Moreover, BellSouth only can ask for a maximum of a one-month deposit for services billed in advance (*i.e.*, UNEs) from ITC^DeltaCom regionally, and a maximum of a one-month deposit from local retail end users, and two months' deposit for retail toll end users, in both Florida and in Alabama. SC Tr. at 543:19-22 (B. Russell Summary, adopted by S. Berlin); *see also* GA Tr. at 987:6-9 (Blake). And at hearing, BellSouth counsel made reference to a three-month deposit provision of an agreement between NewSouth and AllTel. SC Tr. at 548:4-19; JP Direct Test., Exh. B.[27] The one-month deposit provision noted above (and discussed in greater detail below), the two-month provision proposed by BellSouth here, and the three-month provision discussed in the NewSouth/AllTel Agreement, when taken together, seriously undermine BellSouth's "industry standard" argument. Such an argument cannot succeed when the record evidence shows nothing but varied deposit provisions.

BellSouth's concerns about risk of nonpayment also are of dubious origin. That is, Ms. Blake has testified that CLECs in the past have declared bankruptcy, including WorldCom, Adelphia, Cable and Wireless and Global Crossing. Blake Rebuttal Test. at 49:11-14. By this testimony Ms. Blake seems to be suggesting that BellSouth was not paid for services rendered to these companies. Yet in his deposition Mr. Morillo (the witness previously designated for Item 101) was not able to testify that BellSouth was denied payment in *any* of these bankruptcies. Morillo Depo. Tr. at 225:22-24. This kind of unsupported allegation cannot justify BellSouth's continued demands for unduly large,

[27] At hearing, Mr. Russell, whose testimony has been adopted by Ms. Berlin, stated that although AllTel may require a three-month security deposit, it has never requested such a deposit because "[NuVox] is a good customer of [AllTel] and [AllTel] treat[s] [NuVox] as such." SC Tr. at 548:4-19.

capital-consuming and business impacting deposits from Joint Petitioners, especially when experience shows that BellSouth requests too much. SC Tr. at 555:19-556:3. Moreover, it fails to acknowledge that in fact it was BellSouth who owed the estate of a bankrupt CLEC, e.spire (the assets of which, in large measure, were purchased by Xspedius), for significant unpaid awards of intercarrier compensation (the amounts BellSouth wrongly withheld totaled almost $30 million). Falvey Depo. Tr. at 321:2-7. Finally, a purported concern about risk of nonpayment is already refuted by the fact that Petitioners, particularly NuVox, have a good payment history with BellSouth – as BellSouth's own witness stated at hearing, "I don't believe good payment history is an issue being disputed between the parties here." SC Tr. at 551:13-14 (Blake).

It is important for the Commission to recognize that deposits have competitive consequences. Deposits tie up capital that could be used for other purposes, including the deployment of new facilities, expansion of footprint, and improvement of services. As such, deposits should be reasonably curtailed in proportion to the relative risk. In Joint Petitioners' cases, that risk is demonstrably small.

Accordingly, the language in Section 1.8.3 of Attachment 7 should provide for a less onerous deposit than what BellSouth requests. The Kentucky Commission agreed with this position, as it adopted Joint Petitioners' proposal that the maximum deposit should not exceed one month's billing for services billed in advance and two months billing for services billed in arrears. *KY Final Order* at 22-23 (excerpt of order is attached hereto as **Attachment 8**). As indicated above, BellSouth has agreed to accept lesser deposits maximums with other CLECs. ITC^DeltaCom, for example, has secured an agreement for a maximum of **one months'** deposit for services paid in advance, and **two months'** deposit

for services paid in arrears. SC Tr. at 543:19-25; **Attachment 22** (DeltaCom/BST Agreement Excerpt). Joint Petitioners should be eligible for the same maximum deposit provision as a matter of parity and nondiscrimination. 47 C.F.R. § 51.313(a) ("The terms and conditions pursuant to which an incumbent LEC provides access to unbundled network elements shall be offered equally to all requesting telecommunications carriers').

In the alternative, Joint Petitioners ask that the Commission adopt their proposed language for Section 1.8.3: Joint Petitioners must remit a deposit equal to one and one-half month's billings, and any new (as opposed to an established) CLEC that adopts the Agreement must remit a two-month's deposit. Exhibit A at 12. This bifurcated approach allows Joint Petitioners to enjoy the benefits of the long-term business relationship they already have established with BellSouth, while simultaneously granting BellSouth more risk protection from any new or less established CLEC.[28] Accordingly, Joint Petitioners' proposal is eminently reasonable and should be adopted. This issue, after all, is about nothing more than a deposit. It is not an issue of Joint Petitioners failing to pay for services rendered. BellSouth should not have the right to terminate service to South Carolina customers when those customers, or Joint Petitioners for that matter, have done nothing wrong. SC Tr. at 556:4-14.

Item No. 102, Issue No. 7-8 *[Section 1.8.3.1]: Should the amount of the deposit BellSouth requires from CLEC be reduced by past due amounts owed by BellSouth to CLEC?*

POSITION STATEMENT: Because BellSouth's payment history with CLECs is often poor, the amount of deposit due, if any, should be reduced by amounts past due to CLEC by

[28] Joint Petitioners' inclusion of harsher deposit language for unproven CLECs fully resolves BellSouth's worry that a less conscientious CLEC may opt into this Agreement and pose a financial risk.

BellSouth. BellSouth may request additional security in an amount equal to such reduction once BellSouth demonstrates a good payment history, as defined in the Agreement.

Equity Requires That BellSouth Set Off Outstanding Amounts It Owes to Joint Petitioners from the Deposit It Requests Joint Petitioners to Pay.

Item 102 presents an issue of simple fairness: when BellSouth owes past due amounts to the Joint Petitioners, should it be able to demand a deposit from them up to the limit provided in the Agreement?[29] Joint Petitioners' language would address this imbalance by requiring a "set off" of the past due amounts BellSouth owes against the deposit that Joint Petitioners must remit. Such set off would be restored once BellSouth demonstrates compliance with the "good payment history" standard already agreed to by the parties.

BellSouth is far from timely in paying CLEC invoices. According to BellSouth's own testimony, it had been timely for only 38% of the invoices provided by KMC (as measured 30 days from BellSouth's **receipt** of KMC's invoices – so BellSouth's actual performance under the standard it advocates was much worse). GA Tr. at 994:8-16 (Blake). As to Xspedius, BellSouth recently was past due by $2.6 million, and had overbilled Xspedius by $2 million, meaning that BellSouth had laid claim to $4.6 million belonging to Xspedius. **Attachment 3** (KY Tr. at 105:16-21 (Falvey)). *See also* SC Tr. at 552:18-22 (Falvey) (discussing recent settlement of "over four million dollars" in amounts BellSouth owed to Xspedius). And yet BellSouth purported to be owed a deposit necessary to guard *it* from financial risk.

During the pendency of this arbitration proceeding, BellSouth has "cleaned up its act," so to speak, to some extent and has improved its payment record. *See* GA Tr. at 994:16-18 (Blake) (payment record to KMC had improved). However, there are no

[29] Joint Petitioners do not under the Agreement have a right to collect a deposit from BellSouth to protect them from financial risk and harm created by BellSouth's failure to pay for services provided.

assurances that BellSouth will not relapse into the poor payment patterns it historically has had. *See* GA Tr. at 549:11-17 (Falvey). Indeed, BellSouth's amounts owed to Xspedius's predecessor e.spire in unpaid reciprocal compensation exceeded **$25 million**, which Xspedius only recouped after filing multiple actions across the BellSouth region. Falvey Depo. Tr. at 318:21- 319:21. Thus, BellSouth was "sitting on over $20 million of [e.spire's] revenue" and yet continued to seek a deposit. *Id*. at 319:2-3. This history, "where [BellSouth] dispute[s] millions upon millions and then [BellSouth] lose[s] time and time and time again," is why a deposit offset is necessary. GA Tr. at 549:12-14.

BellSouth has created this unimpressive and unproven payment history as to Joint Petitioners, thus increasing their financial risk, yet it will continue to request a maximum deposit from Joint Petitioners on the ground that it must mitigate its own financial risk. GA Tr. at 976:4-9 (Blake); FL Tr. at 1064:14-16 (Blake). This imbalance is neither fair nor commercially reasonable. It means that Joint Petitioners are out of pocket twice — once in the form of bills not paid, and again when the deposit is posted.

Joint Petitioners' proposed language seeks nothing more than to correct this imbalance. It would require BellSouth, when it requests a deposit, to set off amounts past due to Joint Petitioners. This set-off would be revisited on an annual or semi-annual basis, just as Joint Petitioners' deposits are reviewed on an annual or semi-annual basis. The off-set would be restored once BellSouth demonstrates a good payment history as defined in the Agreement (the same definition of good payment history that applies to Joint Petitioners).

Notably, at least two recent state commission decisions support the Joint Petitioners' position that, where BellSouth has not paid its bills to the CLEC — whether disputed or

undisputed — this must be taken into consideration as an offset to the deposit required. In the Kansas arbitration quoted above regarding Item 97, Arbitrator Lehr found that:

> [I]mposition of a deposit upon a previously creditworthy CLEC due to failure to pay some unquantified level of bill may be so out of balance and so vague as to be unacceptable in any corner of the market. The Arbitrator also disagrees with SWBT that the claim of Xspedius is a red herring that should be determined elsewhere. The Arbitrator finds that Xspedius' testimony is on point. **If its position is accurate [that SWBT owes Xspedius substantial sums at the time the deposit was requested], requiring a deposit of Xspedius would be extremely unfair.**

Kansas Decision ¶ 52 (**Attachment 23**).

Likewise, an Oklahoma arbitrator recently reached the same conclusion, and ordered the following language: "3.7.1 In no event will Xspedius be subject to an assurance of payment to SBC OKLAHOMA that exceeds two months' projected average billing by SBC OKLAHOMA to Xspedius, ***less the amount of billings by Xspedius to SBC OKLAHOMA. If SBC owes Xspedius more than $500,000, then a deposit would not be required until such time as the outstanding balance is reduced below this amount.***" Decision of Administrative Law Judge, Oklahoma Corporation Commission Docket No. 2004-493 (emphasis added) (Apr. 12, 2005) (excerpt appended hereto as **Attachment 24**).

Finally, BellSouth's exclusion of disputed amounts from the offset would permit it to obviate the provision by simply disputing what it does not wish to pay and thereby nullifying the effect of the provision. Moreover, BellSouth's proposal continues to avoid acceptance of the very same definition of "good payment history" that the Joint Petitioners and BellSouth have agreed to in the criteria used to trigger deposit and deposit refund requests. It is thus unlawfully discriminatory.

For these reasons, the Commission should adopt Joint Petitioners' position and language for Item 102.

Item No. 103, Issue No. 7-9 *[Section 1.8.6]: Should BellSouth be entitled to terminate service to CLEC pursuant to the process for termination due to non-payment if CLEC refuses to remit any deposit required by BellSouth within 30 calendar days?*

POSITION STATEMENT: BellSouth should be permitted to terminate services for failure to remit a requested deposit **only** if: (a) CLEC agrees that the deposit is required, or (b) the Commission has ordered payment of the deposit. As agreed to by the parties, **all** deposit disputes will be resolved via the Agreement's Dispute Resolution provisions and not through "self-help".

BellSouth Must Not Terminate a Joint Petitioners' Service Based on a Deposit Dispute Unless the Petitioner Is in Violation of a Deposit Order Issued by the Commission or the Joint Petitioner Has Failed to Abide by an Agreement to Post an Agreed-Upon Amount.

BellSouth seeks the right to terminate Joint Petitioners' service if they fail to remit the deposit amount that BellSouth requests within 30 days. Exhibit A at 13. Granting BellSouth that right, however, would be draconian as it would allow BellSouth to impose a wholly non-proportional and customer impacting response for what simply would be a failure to agree to deposit amounts needed to protect BellSouth from relatively modest financial risk. It has nothing to do with "non-payment" for services provided. Joint Petitioners therefore have proposed language that grant BellSouth the right to terminate service for non-payment of a requested deposit amount *only* if Joint Petitioners fail to comply with a Commission order resolving a dispute over a requested deposit amount.

Joint Petitioners also have provided that BellSouth could seek such a remedy if one of them reached an agreement with BellSouth (memorialized in writing) and then simply failed to make good on it. As NuVox testified at hearing, "[w]e don't have any problem if

BellSouth suspends or terminates service to the CLEC if the CLEC has agreed with BellSouth on a deposit amount and then simply refuses to make that deposit[.]" SC Tr. at 555:8-11 (B. Russell, adopted by S. Berlin). But in the absence of an agreement on an appropriate deposit amount, there would be a communications failure that would need to be addressed through less draconian means — for example, a dispute that would be governed by the now agreed-upon language requiring use of the standard dispute resolution process. But the remedy for a failure to respond to a deposit request cannot be, as BellSouth would have it, suspension or disconnection, unless the Commission determines that the failure to respond was inexcusable such that this "ultimate remedy" is appropriate.

As explained above, Joint Petitioners are constrained from discontinuing service absent adequate notice to an end user with opportunity to cure. *See* 47 U.S.C. § 214(a); South Carolina Code of Regulations 103-633. BellSouth is subject to the same constraints. *Id*. Therefore, BellSouth's demand that it be permitted under this Agreement to terminate service for a mere 30-day failure to remit a requested deposit is excessive, and likely unlawful.[30] If there is no agreement on a deposit amount, then the request should be deemed disputed and the dispute should be addressed through the standard dispute resolution process. Joint Petitioners are not trying to evade their contractual obligations to post deposits upon the triggering of the agreed-upon criteria, but rather want the deposit amounts to be determined fairly and sensibly. Obtaining this Commission's resolution of a dispute as to a proper deposit amount is not onerous. Rather, it is the normal course of resolving disputes between

[30] Not only is it improper, BellSouth's proposed language is unnecessary. None of Joint Petitioners' existing interconnection agreements give BellSouth the right to terminate their service over a deposit dispute, GA Tr. at 597:13-16 (Russell), and yet BellSouth has secured deposits from them. *Id*. at 537:21-23 (Russell) (NuVox deposit is $1.5 million); Falvey Depo. Tr. at 314:9-14.

BellSouth and CLECs. Moreover, suspension or termination should not be imposed as a remedy for a failure to respond to a deposit request when this Commission would have no idea as to whether the specific request was proper or that it was ever received. Regardless of the circumstance, such drastic remedies cannot reasonably be proposed without the Commission's involvement and oversight.

In light of the foregoing, it is not surprising most state commissions that have ruled on this issue to date have ruled in favor of the Joint Petitioners. The Kentucky Commission found that "BellSouth should not be permitted to terminate [Joint Petitioners'] services when the [Joint Petitioners] have met all their financial obligations to BellSouth with the exception of the demand for deposit," adding that "when such disputes arise between BellSouth and a Joint Petitioners, the dispute resolution provisions should be invoked." *See Joint Petition for Arbitration of NewSouth Communications Corp. et al. of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as amended*, Case No. 2004-00044, Order at 20 (KY P.S.C. Sept. 26, 2005) ("*KY Initial Order*") (initial decision affirmed in *KY Final Order*) (excerpt of this order attached hereto as **Attachment 25**). The Tennessee Regulatory Authority has not released a final order in the concurrent arbitration in that state between the Parties, but the Authority has rendered a vote in the arbitration proceeding favoring the Joint Petitioners on this issue, ruling that the dispute resolution provisions of the agreement should be followed prior to any service termination. *See TRA Conference Transcript* at 37:15-39:10 (excerpt of transcript attached hereto at **Attachment 10**). The Georgia Commission adopted Joint Petitioners' proposed language on this issue. *See Georgia Order* at 36-37 (excerpt of this order is

attached hereto as **Attachment 5**). This Commission should similarly adopt Joint Petitioners' position and proposed language for Item 103.

July 27, 2006

Respectfully submitted,

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BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2005-57-C

IN RE:

Joint Petition for Arbitration on behalf of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC and Xspedius [Affiliates] for an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended.	)))))))	**CERTIFICATE OF SERVICE**

This is to certify that I have caused to be served this day, one (1) copy of Joint Petitioners' **Post Hearing Brief** via electronic mail service and by placing a copy of same in the care and custody of the United States Postal Service (unless otherwise specified), with proper first-class postage affixed hereto and addressed as follows:

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